

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

IN RE: DISPOSABLE CONTACT
LENS ANTITRUST LITIGATION

MDL Docket No. 1030
ALL CASES

**PLAINTIFF STATES' CONSOLIDATED
STATEMENT OF FACTS**

TABLE OF CONTENTS

<u>Introduction</u>	1
A. <u>Overview of State Plaintiffs' Case</u>	1
B. <u>A Brief History of The Contact Lens Market Through 1988: The Early Conspiracy</u>	8
<u>A "New Sales Policy for a New Contact Lens Modality: Vistakon</u>	10
<u>The Manufacturers "Get the Message" on a "New" Sales Policy</u>	16
<u>Early AOA Efforts to Enact Laws to Eliminate Alternative Channels</u>	19
<u>B&L Adopts a "New" Anti-Mail Order Sales Policy</u>	28
<u>AOA/State Association Mail Order/Pharmacy Activity</u>	32
<u>The Manufacturers' Purported Post-1988 Policy of Restricting Sales of Disposable Contact Lenses to ECPs</u>	36
C. <u>The Fall 1989 Meetings and Agreements</u>	38
D. <u>1989 AOA Meetings to Enlist Manufacturers in the Conspiracy to Eliminate Sales to Discounters</u>	44
1. <u>The AOA-B&L Meeting</u>	44
2. <u>The AOA-Vistakon Meeting</u>	47
E. <u>The Parties' Post-1989 Meetings Efforts to Eliminate Alternative Distributors</u>	50
1. <u>The Immediate Aftermath</u>	50
2. <u>The AOA Defendants' Letters to Other Manufacturers To Endorse Restraints</u>	55
F. <u>The AOA "Health Concerns" Survey and Report to the FDA</u>	56

G.	<u>The 1991-92 AOA CLASS and AOA Meetings/Agreements with Manufacturers Concerning Both New and Increased Supply Restriction Enforcement Against Alternative Channels</u>	60
1.	<u>1989-1990 Market Developments</u>	60
	<u>CLASS is Formed</u>	62
a.	<u>The Fall 1991 Vistakon-CLASS Meeting</u>	65
b.	<u>The AOA-Vistakon Meeting</u>	72
	<u>“Demand”/“Supply” Diversion Strategies</u>	74
	<u>Bain & Company “Patient Retention” Study</u>	76
	<u>Missing “Minutes” of AOA/Vistakon Meeting</u>	78
	<u>“Fitter on the Premises”: A New Policy</u>	79
c.	<u>The AOA-B&L Meeting</u>	81
2.	<u>The Defendant Manufacturers’ Post-Meeting Steps Against Alternative Channels</u>	83
	<u>Vistakon’s “Fitter on the Premises” Policy Goes Into Effect</u>	83
	<u>B&L Follows Suit with its New “Fitter on the Premises” Policy</u>	86
H.	<u>The “Demand Side”/Prescription Conspiracy</u>	88
	<u>The HSM Group Programs</u>	94
	<u>Other Vistakon Prescription Release Related Activity</u>	96
	<u>B&L “Dream Team”/B&L University</u>	98
I.	<u>Conspiracies’ Substantial Impact on Consumers in the Plaintiff States</u>	99
	<u>Conclusion</u>	102

Introduction

All defendants argue that Plaintiff States cannot set forth materially disputed facts which would either directly or circumstantially prove a conspiracy in violation of Section 1 of the Sherman Act. Each defendant supports its argument with its own highly selective recitation of the "facts" and then argues what, if any, inferences can be drawn from these facts. Defendants' factual renditions are, however, both incomplete and often incorrect.

In March of 1997, Plaintiff State of Florida filed a "Consolidated Statement of Facts," with supporting evidence, which addressed the then pending Motions for Summary Judgment as made by Defendants American Optometric Association ("AOA"), Johnson & Johnson Vision Products, Inc. ("Vistakon"), and Bausch & Lomb, Inc. ("B&L"). At the current time Plaintiff States are responding to Motions for Summary Judgment from each of the same defendants as well as Doctors Elliot, Gazaway, Hopping, Leadingham, Remba, Rigel, Solomon, Sullins (the "Individual AOA Defendants"), Dr. Yamane, and Doctors Snyder and Klein. In support of their responses to these pending Motions, Plaintiff States adopt the factual recitations, with supporting evidence, presented to this court by the State of Florida in their prior filing. Docket # 277 ("Florida Consolidated Facts").

A. Overview of State Plaintiffs Case

There exists substantial evidence of a conspiracy between the AOA, CLASS, the constituent practice management groups that compose CLASS, the individual AOA defendants, Doctors Yamane, Snyder, Klein and Vistakon. There is also evidence of a conspiracy between the AOA, CLASS, the constituent practice management groups that compose CLASS, the individual AOA defendants, Doctors Yamane, Snyder and Klein and B&L. There is even

evidence of meetings and discussions between the manufacturers to address the alternative channels and the threat that they offer, both directly to the ECPs and, through the ECPs, to the manufacturers.

The facts of this case clearly show that the AOA and the other defendant ECPs used their power as influential representatives of the community of "gatekeeper" eye care practitioners (ECPs)¹ to induce -- via the threat of an ECP boycott -- both Vistakon and B&L into agreements to enact, interpret and enforce sales policies for, and sales practices regarding, their new disposable lens products so as to foreclose the sale of replacement disposable contact lenses to and by alternative channels of distribution.²

Vistakon and B&L each announced a "sales policy" that was to be in effect at and from the times of the national introduction of their new disposable/frequent planned replacement lenses, which occurred in 1988. These policies -- which were released only after meetings with ECPs which involved discussions about just what ECPs thought should be the channels of distribution for these new lenses -- both purported to limit the sale of these new lenses to ECPs

¹In this litigation, an ECP or "eye care practitioner" means an ophthalmologist, optometrist or optician. An ophthalmologist is a medical doctor (M.D.) who rarely participates in the sale of replacement contact lenses. An optometrist possesses an O.D. degree from an optometric school. Optometrists who fit contact lenses generally participate in the retail market for replacement contact lenses in addition to charging fees for examinations. Opticians generally have no graduate degree requirements but receive specialized training in the manufacture of eyeglasses and the dispensing of eyeglasses and other items. Significantly, opticians cannot, in any of the Plaintiff States, write prescriptions for contact lenses. This fact alone demonstrates the pretextual nature of Vistakon and B&L's "avoiding market failure" argument that a policy of selling lenses only through ECPs encourages ECPs to write prescriptions for those lenses.

²In this litigation, "alternative channels of distribution" means mail order, pharmacies, buying clubs, department stores, mass merchandise outlets and other distribution channels other than Os.

only, and not to alternative channels of distribution. However, the record reveals that these policies were neither widely known within the ECP community nor vigorously enforced.

The record also reveals that these 1988 sales policy statements did not embody a sales and distribution practice for this new modality of vision correction which would reflect either the actual nature of the lens or its appropriate and actual use by consumers if it were to become a commercial success over time. As such the 1988 sales policy statements for both Vistakon and B&L's new lenses did not represent a statement of distribution in the independent economic self interest of the defendant manufacturers (discussion, infra).

Following the actual introduction of disposable contacts, even with the promise of distribution only pursuant to the agreed upon restrictive sales policy statements of the defendant manufacturers, ECPs -- particularly the AOA's leadership most active in the sales of contact lenses, and therefore the ECPs most afraid of losing profitable replacement lens sales to alternative channel competitors -- became unhappy with the reality of diversion in the marketplace. These ECPs then undertook what would become an evermore strident and, eventually, evermore effective organized campaign to wield their legal, economic and peer group influence over the manufacturers -- influence significantly heightened by the manufacturers themselves (discussion, infra) -- to require the defendant manufacturers to agree to "toe the line" on this essentially economic issue of who was going to sell these new replacement lenses.

The stated concerns of the AOA leadership and the other named ECP defendants were of particular significance to the manufacturers for two interrelated reasons. The record is clear that the manufacturers, in an effort to gain rapid acceptance for their new lens products, originally created pre-launch "Advisory Panels," groups of well-known clinical and practice management

experts, many of whom are the named individual defendants and identified co-conspirators here (Amended Complaint, January 17, 1997, Paragraphs 18 and 20-21). It was during such pre-launch meetings that the ECPs' concerns with the possibility of this new product becoming available to alternative channels were discussed (discussion, infra). It was that input plus that obtained from meetings of the manufacturer defendants with both AOA and individual state optometric association leaders prior to the national launches of the lenses (discussion, infra) which led to the announced "ECP Only" sales policy statements to cover the sales of these new modality lenses.

As part of the launch of these new modality lenses, the manufacturers also established marketing programs to "sell" the ECP community on this new method of vision correction, with many of these same defendants and co-conspirators acting as paid professional spokespersons for the manufacturers. Thus as a result of the manufacturer defendants having built up the prestige and thus peer influence of these defendant ECPs in that early marketing effort, when these same ECPs later voiced threats to boycott a manufacturer's lenses should that manufacturer fail to respond with even greater efforts to fight the clearly growing volume of the lenses moving through alternative channels, such threats had greater weight than if made by an unknown ECP of no national standing, reputation and peer influence.

However, a threat to be "first in, first out" of the sales and marketing of Acuvue, when made, for example, by a firm of ECPs which had been not only test marketers of the lens, but had also been paid to speak on national marketing and promotional tours, was a threat to be taken very seriously, and it was (discussion, infra). This particular threat came in Fall 1991 in two

letters from well known³ practice management specialist defendant Dr. Ronald Snyder

These letters, sent to both Vistakon and B&L, told these manufacturers just what Snyder and his partners, defendant Dr. Paul Klein -- the Editor of Vision Monday, a national ECP trade magazine, as well as author of numerous clinical and practice management articles⁴ -- and defendant Dr. Jack Solomon -- nationally renowned contact lens clinical as well as practice management scholar and the 1991-92 Chairman of the AOA/CLS⁵ -- would be willing to do. The letters spelled out their intention to relay boycott advice to other ECP "colleagues" including the membership of CLASS, the Contact Lens and Anterior Segment Society, "who are turning to us to help them cope with the erosion of their Acuvue market" (discussion, infra).

These were neither idle nor isolated threats.⁶ The defendant manufacturers knew that a threat to boycott their lenses from the very same ECPs who had originally promoted these same lenses to their peers could be a real danger to future sales of the product.

The second prong of this threat was premised upon the unique power of the ECP as a "Gatekeeper," the person who, because they wrote the prescription for the lens, completely controlled the flow of lenses, including the choice of lens type, to consumers. Should ECPs become dissatisfied with the efforts of a manufacturer to control the availability of its lenses to alternative channels, they could then decide not to write a prescription for that manufacturer's

³ See Klein Deposition, October 20, 1998, pages 53-54; 75-77.

⁴ See Klein Deposition, supra, at pages 55-60; 62-70.

⁵ See Klein Deposition, supra, pp. 53-54.

⁶ The threats which occurred were not just of possible independent boycotts by single optometrists, but were threats to "organize other ECPs to stop using Vistakon products," e.g., Vistakon Customer Relations Data Form," October 22, 1991. J2307.

lens, either prescribing that of another, more compliant company, or writing for a different modality of vision correction altogether. The threat to do this left a manufacturer facing either a reduced or failed market for sales of its targeted lenses.

When you couple this "Gatekeeper" role in writing prescriptions -- which every member of the AOA shares -- with the peer group prestige, influence and ECP community leadership status of the named ECP defendants and their co-conspirators, then it is clear that a relative handful of individuals, acting in a coordinated fashion -- and seen by the manufacturers to be able to influence their colleagues all across the nation while also representing a disproportionately large percentage of total sales in the subject lenses (discussion, infra) -- would be able to induce a manufacturer to agree to act as they demanded.

In this case, the demands made of the manufacturers were to enact, enforce and, when the ECPs thought it had become necessary, to rewrite and then more aggressively enforce otherwise ineffectual, mere "window dressing" sales policies. The ECPs wanted the manufacturers to act to either make purchases of contact lenses by alternative channels impossible, or at least extremely difficult and costly. Failure to do so was to face a boycott of their lens products.

In addition to this effort at cutting off the supply of lenses to the alternative channels, the ECP defendants also worked with the manufacturer defendants who, also understanding the basic laws of the marketplace, likewise knew that they had to address both sides of the supply and demand equation⁷ to limit consumers' demand for those lenses which alternative channels still

⁷Compare Phil Keefer's January 2, 1992 Memo on "Control Demand/Control Supply," J 7852-54, with the Wisconsin Optometric Association's (WOA) 1988 "Never let the prescription leave the office" advice to its members on how to combat demand for lenses at pharmacies and mail order. WOA 00506, see fn. 58, infra.

managed to obtain from “grey market” sources. This demand side conspiracy, sometimes referred to as the “prescription conspiracy,” was effectuated by a coordinated program of the ECP defendants acting in concert with the defendant manufacturers first to promote, and then encourage the ECP community at large to adopt, the “best practice” (discussion, infra) of either refusing to release the prescription needed to purchase lenses to either their consumers or to third parties such as alternative channels, or of establishing in-office procedures designed to delay or, if at all possible, deny consumers’ requests for their prescriptions. This agreed upon course of action encouraged ECPs to adopt business practices such as writing prescriptions with medically unwarranted or even capricious expiration dates, which would limit the utility of a prescription once in the hands of a consumer who wished to purchase replacement lenses from alternative channels. (Discussion, infra)

The purpose and result of these schemes were to injure the directly competing rivals of the ECPs, with the net effect of this two-pronged conspiratorial effort being an increase in the retail price of replacement contact lenses charged to consumers in each of the Plaintiff States. The increase resulted from the conspirators having foreclosed or, at a minimum, reduced price competition. The attempted total foreclosure, and the effective actual crippling, of an unrestrained retail replacement lens market where vigorous competition would have clearly affected the price of lenses available through all channels of distribution set the stage for the AOA’s members and others – including the alternative channels of distribution who were forced to go along because of increased costs -- to charge more for replacement contact lenses than they could in a truly competitive market.

//

B. A Brief History of The Contact Lens Market Through 1988 :The Early Conspiracy

Prior to the introduction of soft contact lenses in the early 1970s, contact lenses were made of hard plastic and usually custom made for the patient by the optometrist or ophthalmologist, or by a laboratory that would manufacture them to the doctor's specifications. The lens would then be fitted on the eye by the practitioner, who would modify the lens as necessary. Replacement lenses were also custom made and fit by the ECP.

Both the contact lens market generally and the fitting process specifically changed with the introduction of soft contact lenses by B&L in the early 1970s. Soft contact lenses were not custom made and only a few limited parameters were available. Contact lenses were generally worn for a year and were not replaced until the next annual, or bi-annual,⁸ exam. A replacement lens was often necessary only if the patient ripped or lost a lens since her last exam. Because reproducibility of the lens was sometimes a significant problem – each lens being produced by lathing a bead of plastic which was then hydrated to its full size – it was normally the practice for an ECP to examine each replacement lens on the patient's eyes to make sure the fit and powers were accurate and comfortable.⁹

However by 1985, when there were still only traditional soft lenses, and no disposable lens product in the U.S. market, the ECP community at large, and in particular the Contact Lens Section of the AOA – a sub-division of the AOA composed of optometrists whose practice particularly emphasized contact lens sales -- was already concerned with the emergence of

⁸See AOA Website recommendation of Bi-annual eye exams for otherwise healthy 19-40 year olds.

⁹See generally the Lowther Report at pp. 18-19, Florida Consolidated Facts Tab 1.

alternative channels of distribution for replacement contact lenses. To combat these pharmacy and mail order sales, leaders within the ECP community active in contact lens sales sought to develop official AOA, as well as state optometric association, recommendations with regard to such "over the counter" sales.¹⁰ Aware that U.S. Postal Regulations did not prohibit mail-order sales of lenses,¹¹ leaders of the AOA/CLS drafted "Position Papers" on "Over the Counter & Mail Order Contact Lenses," which argued against the sale of soft lenses by pharmacy and mail-order outlets¹² to consumers.¹³ These position papers were relayed to the leadership of the AOA by early 1986,¹⁴ including to and by defendant W. David Sullins, then the Liaison Trustee representative of the AOA's governing board to the Contact Lens Section.¹⁵

While there had been a series of steps undertaken by ECPs to address the economic threat to their practices of the sales of soft contact lenses by alternative channels, it was the growing awareness throughout the ECP community of the impending national release of a new lens modality, a truly disposable contact lens, which really motivated ECP efforts to address the emerging alternative channel threat.

//

¹⁰Contact Lens Section Council Meeting April 14, 1985, ATS 971095-96.

¹¹U.S. Pharmacist, July 1985. S000042.

¹²Farkas CID Statement July 15, 1996, Exhibit 17, at page 106; A 0001051-56.

¹³Monsein to Lieblein Letter of December 30, 1985. A 005360-61.

¹⁴Giroux Memo to Tom Eichhorst, AOA General Counsel January 16, 1985. A 005359. Eichhorst Deposition February 10, 1999, Pages 156-161, Exhibits 5 and 5A

¹⁵Contact Lens Section Council Meeting Minutes, February 22-23, 1986. ATS971503-05

A "New" Sales Policy for a New Contact Lens Modality: Vistakon

While it may have been debatable that an "ECP only" distribution scheme was appropriate when the lenses being fitted and dispensed were subject to frequent manufacturing defects -- thus possibly necessitating special attention to the fitting of each new lens on the eye on the infrequent occasions when a replacement lens was needed between regular eye exams -- this argument would not, and in fact could not, remain either logical or persuasive if the new disposable lenses really were to be both disposable and manufacturing defect free, as promised. Any commercially successful disposable lens would have to be both regularly and frequently replaced on the eye by the consumer. Any attempt to market a "disposable" or "frequent planned replacement" lens that required special ECP only handling for, and individualized dispensing of, each and every replacement lens, was a concept doomed to failure on both economic and pragmatic grounds. Vistakon and all of the other manufacturers considering the introduction of such lenses knew this from the earliest stages of their pursuit and promotion of this new lens modality.¹⁶

In fact, in his regular editorial column in Vision Monday, one entitled "Disposable

¹⁶See The McKinsey Report, 1985, "Developing an Entry Strategy for Molded Contact Lenses," (V 05508-56) which discusses this reality, and examined many distribution alternatives -- including several forms of mail delivery of replacement lenses directly to consumers. This distribution approach -- which was clearly in Vistakon's independent economic self interest -- produced many negative ECP responses (V 05455). Thus by the time of the January 1988 McKinsey Report, "Achieving Acuvue Profitability" (V 05717-66; Exhibit 29 to Greer Liability Report) as discussed extensively at pages 36-40 of the "Liability Report on Collusive Restraint of Trade In The Sale of Contact Lenses" Docket Number 655, ("Greer Liability Report") it was no longer being seriously advanced, despite its superior profitability.

Contact Lenses Have Trashed Old Rules,”¹⁷ defendant Paul Klein lays out a very telling history of both the introduction of the new disposable lenses – how they were perceived and received by the ECP community – and the fact that these lenses are so significantly different from the prior lens modalities that it was both foreseeable and inevitable that the replacement lens market for this new lens was going to be a retail, and not a professional, one.

As Klein describes it, prior to the introduction of the disposable lens, the ECP “accepted standard of care” for a traditional soft lens “required supervision of fit and prescription to manage complications.” He recites how even with the traditional lens there had been retail, non-ECP seller of lenses who had pushed consumers to get their prescriptions from their ECP once the “fit is completed” so as to have “freedom of choice” as to the source of replacement lenses. Klein states that “ODs resisted on the basis that the patient’s health and safety was best served when [traditional] replacement lenses were inspected on the eye by the professional.” Id.

What is particularly revealing about this article is Klein’s very next statement:

“The position of retail dispensers was immeasurably strengthened by widespread acceptance of disposables.

Previous claims by ODs that standards of care required replacement lenses to be evaluated on the eye could no longer be sustained. The issue of necessary ongoing care also became moot as disposables were sold as the ‘healthier’ alternative to reusable lenses.” (Id., emphasis added.)

What Klein describes as history, the manufacturers knew back in 1987-88 would be the logical, in fact, inevitable future for their new product. This new lens would – and did, as the McKinsey Report had made clear – by its nature and design dictate an open distribution program,

¹⁷Vision Monday, April 4, 1994, page 50.

one where these lenses would be available in all channels of sales. That open distribution would have been the self-interested preference of any manufacturer who believed in this new lens.

In 1987, Vistakon, initially on a test market basis, commencing in Florida in July of 1987 and then following up in California in early 1988, introduced consumers and the ECP community to their new disposable lens product, the Acuvue lens. Vistakon's new manufacturing process made this lens commercially possible because of greatly increased precise reproducibility of lenses of all powers and curvature.¹⁸ Because the "disposable" lenses were designed to be replaced at regular intervals between scheduled examinations – for example, a new pair every week or two, depending upon wearing schedules – it was clear that it was no longer necessary, practical, or even desirable for an ECP to examine each replacement lens on the eye.¹⁹ It was also clear from the start, not only to the members of the ECP Advisory and Marketing Panels for Vistakon, B&L and CIBA-Geigy²⁰ but to ECPs generally, that consumers would look for the least expensive outlet to purchase the multiple boxes of replacement lenses they would need between normal visits to their eye care practitioner. The replacement disposable lens was the "to

¹⁸Lowther Report at 19, Tab 1; Solomon CID at 46.

¹⁹Solomon CID at 42; Sullins depo. at 69-70.

²⁰Advisory and Marketing Panel members in the late 1980s and early 1990s included defendant Jack Solomon (J 4678), defendant Dr. Ronald Snyder (J 12444), defendant Dr. Paul Klein (Klein Deposition, supra, p. 72), co-conspirator Dr. Wayne Cannon of CLASS and Society of Contact Lens Specialists (Wechsler Deposition, p. 110), co-conspirator Dr. Barry Farkas (J 4678), co-conspirator Dr. Roger Kame (J 4678), co-conspirator Dr. Jerry Lieblein of CLASS (J 4678), co-conspirator Dr. Jack Melton (Wechsler Deposition, p. 100) of CLASS, defendant Dr. Melvin Remba (Remba Deposition December 13, 1995, p. 37), defendant Dr. Lee Rigel (Rigel Deposition February 26, 1998, p. 95), co-conspirator Dr. David Sullins (Sullins Deposition, March 20, 1996, p. 18), and Defendant Dr. Stanley Yamane of CLASS (Walsh Deposition, February 27, 1995, pp. 38-39).

be feared commodity” lens product which the AOA/CLS had sounded a warning about as early as 1985-6. See fn.10, supra.

In fact, the record reveals that in the Vistakon Acuvue Advisory Panel meetings which began in February of 1987, the panel members – including Defendants Yamane, Rigel and Solomon, along with co-conspirators Davis, Farkas, Leiblien, and other AOA leaders – aggressively discussed their concerns with possible mail order and pharmacy sales of these new lenses.²¹

In Florida, during the test market stages of the lens introduction, Vistakon was informed by the advisory panel members that Vistakon should limit sales to the “Three O’s Only,” as ECPs generally were concerned that if the lenses became available to alternative channels it would cause ECPs to lose business. When Vistakon first introduced the lenses as a trial item to a forum of California ECPs, Bernie Walsh, President of Vistakon, was told that ECPs were concerned that these lenses would end up in the hands of mail order and pharmacies, as was the case with other lenses, a prospect that made ECPs very unhappy.²² Their fears were, as subsequent events proved, well founded, as more and more consumers over time did turn to cheaper and more convenient sources of replacement contact lenses from alternative channels, such as mail order and pharmacies.²³

²¹See Weschler Florida CID Statement pages 29-34, 56-57; Yamane Deposition, March 30, 1995, pages 46-48; Walsh Deposition, February 27, 1995, pages 38-39.

²² See Maurice Binion Deposition, May 17, 1995, pp. 16, 24-29; Ellen Preston Deposition March 8, 1995, p. 22.

²³See generally, Frost & Sullivan (1992), pp. 1-2, IV-6, IV- 48, Florida Consolidated Statement of Facts Tab 4.

This fear of competition and the demand that Vistakon adopt a policy not to sell these new lenses to these competitors led to several meetings between the leaders of the ECP community and Vistakon in the Summer of 1988, all occurring prior to the national launch of this new product. Bernie Walsh and other Vistakon executives attended the annual National Congress of the AOA held in Chicago, Illinois in June of 1988, at which time, after months of agitation within the AOA to adopt an anti-mail order, anti-pharmacy sales position, the AOA adopted the California Optometric Association (COA)/AOA-CLS "Mail Order Resolution"²⁴ as an official policy position (see discussion, infra).

This development surely came as no surprise to Vistakon. Earlier that same month the Vistakon Acuvue Advisory Panel had met on June 3-5, 1988, to discuss the upcoming national launch of Acuvue. The Panel Members -- including co-conspirators Davis, Farkas, Lane, Leiblien, and defendant Solomon (who days later attended the last AOA/CLS meeting held before the AOA National Congress where the final version of the Resolution was agreed upon, see fn. 24, supra) as well as members of co-conspirator Contact Lens Association of Ophthalmologists (CLAO), including Doctors Atwood, Asbell, Hartstein, Lembach and Farris -- were all selected by Vistakon out of recognition of their positions as outstanding leaders in the contact lens field.

These ECPs, all frequent authors and lecturers on clinical and practice matters, also were

²⁴ See Memo of June 14, 1988 from Gordon to Board of Trustees of the COA, including defendant Elliott, concerning the meeting in St. Louis of the AOA Contact Lens Section, Licensure and Regulation Section and AOA Board members, along with defendant Dr. Jack Solomon, where there was agreement as to the final wording of the "Mail Order Resolution" later adopted by the AOA Congress. Z 00114-116; COA 00001015-16; Dr. Robert Gordon Deposition, January 14, 1999, p. 239, Exhibit 27.

the heads of sizeable contact lens practices. They had been selected not only to inform and advise Vistakon but also to "get the message out" -- via speeches and articles which they then wrote and presented -- about this new modality, thus encouraging its acceptance by their peers and colleagues. This distinguished group once again expressed concerns about how distribution of this new high volume "commodity" lens was to occur and asked that Vistakon act to foreclose mail order as it would be an economic drain on their practices.²⁵

It was a similar concern, and a prescience that Vistakon's actual distribution practices for this new, high volume lens might in fact be as porous as the actual distribution of Vistakon's Vistamarc and Hydramark traditional soft lenses -- which were being sold by mail order firms located in California and Florida despite a supposed "ECP Only" policy on same²⁶ -- which led to a meeting between Vistakon and the leadership of the California Optometric Association prior to the formal national launch of the Acuvue lens. This meeting was later memorialized in a letter "of concerns" written by Dr. Harry Charm, President of the COA, to Bernie Walsh after the introduction of Acuvue.

Dr. Charm, the self described "president of a state optometric association with the largest population of optometrists in the country," indicated great concern that Vistakon's new lens was being marketed as a retail product rather than as the "PRESCRIPTIVE product" which Vistakon had assured the ECP community the lens was to be treated as when distributed nationally. He also stated that "I am concerned" that because of Vistakon's actual sales practices, Vistakon's

²⁵See VIST 0025248-58; J 4673-80; Preston Deposition pp. 299-303; Wechsler Deposition pp. 54-64; Leiblien Cal. CID Statement pp.52-62, 64.

²⁶See Keefer Deposition, February 22, 1999, at pp. 177-78. See also LE 000002; AOA 04632, L00145.

"ECPs Only" distribution promise -- as repeated both in California and in Chicago at the AOA Congress by "a company that has made a concerted effort to reach the profession and maintain a healthy exchange of ideas" -- had been broken.

Charm reminded Walsh that this had happened despite Vistakon having assured the COA that it would "never happen" that "Acuvue could be headed toward the drug stores, pharmacies, and perhaps even supermarkets of America" because Vistakon "would fear the loss of support from the optometric as well as the ophthalmological community, and that if doctors did not prescribe the lens there would be no patient demand for it," should such alternative channel sales come to pass.

Of particular interest to Plaintiff States is that, despite Charm's testimony that he did author this letter and his belief that in the normal course of events he would have definitely expected a response from Vistakon's President, Dr. Charm cannot recall seeing a response and can't produce a response from COA files.²⁷ Of even greater interest is that Vistakon -- despite numerous requests for same -- has failed to produce not only any response from Walsh, but has also failed to even turn over a copy of this COA letter from their files.

The Manufacturers "Get The Message" on a "New" Sales Policy

Bausch & Lomb did not release its new 'disposable' style lens until late 1988, but before this occurred the company had already heard from the ECP community -- directly at events such as the 1988 AOA National Congress, as well as through other manufacturers -- about the concerns which the ECPs had with the alternative channels as competitors in the sales of this new

²⁷See COA 401-404; L 00907-910; Charm Deposition, Exhibit 49, pp 247-74, at 269, 272.

vision correction modality.

In manufacturer to manufacturer meetings of the Contact Lens Credit Group -- an organization which meets three to four times a year for the stated purpose of discussing the credit standing of various purchaser accounts -- representatives of Vistakon, B&L and CIBA, among others, repeatedly heard presentations in 1988 not only about credit questions, but also on "Mail Order and Diversion" and "Mail Order Lens Houses" which were not exactly credit worthiness subjects.²⁸ In fact, B&L itself brought up the question of the credit worthiness of one of its customers, Contact Lens Service (C.L.S.Inc.) of Solon, Ohio, a known pharmacy drop shipment alternative channel seller (Id., at CB 1481). The fact of these sales, which continued until at least 1992,²⁹ clearly contradicts B&L's current assertion that it always had an "ECP Only" sales policy in force, as opposed to merely in writing, even in 1988, before the introduction of its disposable style lens, the Seequence lens (see B&L "Motion for Summary Judgment Against the Plaintiff States on Federal Antitrust Grounds," pages 1, 4-7).

Meetings of the Contact Lens Institute (CLI), a trade association of lens manufacturers including Vistakon, B&L, and CIBA, were another forum where manufacturers were jointly

²⁸Minutes of Contact Lens Credit Group, San Diego, California, January 14-15, 1988 (Pages 58-64); New Orleans, May 26-27, 1988. (CBO 1474-84.) Such discussions also occurred after 1988, e.g., Contact Lens Credit Group, Minutes, January 18-19, 1990 (CV02766-74) when, after the "Antitrust Statement" was read (CV 02767), the companies assembled, **including B&L and Vistakon**, discussed "mail order distributors" in general (CV 02768) and Lens Express (CV 02773, #14a & b) in particular. In addition, the manufacturers -- each of whom knew the others' TRW Identification codes -- could, and did, keep track of which companies were selling lenses to which alternative channels. See CB 02224, listing sales to Dial-A-Contact Lens by Vistakon, B&L and CIBA in Fall of 1989 and early 1990.

²⁹Letter from Russell Daniels to Dr. Ginis of CLS, May 18, 1992. Florida Consolidated Facts Tab 33.

made aware of the concerns of the ECPs about their competitors, the alternative channels. Such discussions occurred – once again – even before B&L launched its new disposable lens, with its supposed “ECP Only” sales policy.

An example of this manufacturer opportunity to discuss ECP concerns occurred in early June of 1988. COA Trustee and President Elect Robert Gordon wrote the Chairman of the Contact Lens Institute and requested that the CLI -- including B&L and Vistakon -- consider both issuing a statement of support for the COA’s proposed state legislative ban on mail order sales of contact lenses and endorsing the COA’s draft AOA Resolution proposal calling for a total Federal law ban on mail order sales of lenses.³⁰ While the matter was apparently tabled without a vote – but not necessarily without discussion -- at the June 13, 1988 CLI meeting, it was not killed outright until months later, plenty of time for the manufacturers to consider and weigh these requests from organized optometry.

Finally, on October 4, 1988 with a quorum of CLI members present, including Vistakon’s representative and Hal Johnson, President of B&L, it was “agreed” that “because of potential antitrust ramifications the proposal of the California Optometric Association was not a proper subject for discussion at a CLI meeting.”³¹ Nonetheless, in between times, as noted in a letter of August 30, 1988 from defendant Dr. Jack Solomon to B&L’s Director of Professional Services David Reischer, B&L had become active on the subject of “the California ‘mail order issue’” (where, as Solomon further noted) the leaders of the COA were very pleased and grateful for

³⁰See Gordon letter , June 1, 1988, A 003925; COA letter to AOA, June 6, 1988, AOA 01274-77.

³¹See “Minutes of the Contact Lens Board Meeting. October 4, 1988,” 00082-87 at 00087.

(B&L's Reischer) taking the time and making a positive response to their legislative endeavors."³² The manufacturer defendants were both well aware – from commonly heard sources and at mutually attended functions – of the ECPs' increasingly strident demands.

While, as noted above, mail order and pharmacy suppliers of replacement contact lenses existed before the introduction of disposable lenses, the replacement lens market for traditional soft lenses had been more limited.³³ Even then the alternative channels sold replacement soft, as well as hard, non-disposable lenses at much less of a markup than ECPs, who commonly charged two to three times the cost of the lenses.³⁴ Hence, ECP trade associations, including the AOA and its many State Association members, had, as mentioned previously, grown increasingly concerned about the economic impact of new outlets for discount competition even prior to the introduction of disposable lenses.³⁵

Early AOA Efforts to Enact Laws to Eliminate Alternative Channels

The AOA's concern with discount channels of distribution³⁶ began in the mid 1980s

³²See B&L 000723.

³³See, e.g., letter from Monsein to Lieblein dated December 30, 1985, fn. 13, supra, at A005360- 61.

³⁴Rigel depo. at 74-75.

³⁵See, e.g., letter from Giroux to Eichhorst dated January 16, 1986, Florida Consolidated Facts Tab 5 at A005359.

³⁶It is certainly arguable that in addition to concerns about price competition, ECPs were concerned that patients who received a non-disposable replacement lens from an alternative channel would not have that lens examined on the eye for proper fit. However, as discussed above, no such health risk is associated with disposable lenses as their manifest reproducibility eliminated that limited risk. Thus with regard to disposable lenses "health concerns" became a pretextual excuse for the imposition of restraints against sales to mail order and pharmacy channels.

when it came to the attention of members of the AOA that replacement contact lenses were available from a limited number of alternative channels of distribution. As early as 1985, the Issues Committee of the AOA's Contact Lens Section (CLS) developed its report and policy recommendation urging "the prohibition the sale [sic] of mail-order contact lenses to the public."³⁷ When asked to review this AOA/CLS paper, which had been expanded to cover a prohibition of pharmacy as well as mail order sales, the Licensure and Regulation Section of the AOA decided that the position paper should only be given out on a "need-to-know " and "request basis only" as any publicity about the issue might lead to additional alternative channels becoming aware of the opportunity for such sales and general dissemination of the report might appear "self-serving."³⁸

In early 1986, Arthur Giroux, O.D., an optometrist who served as the Administrative Director of the CLS, described "over-the-counter and mass merchandising" of contact lenses as "discomforting,"³⁹ and by September of 1986 the Contact Lens Section, including defendants Solomon and Remba along with numerous co-conspirators, had developed a "Position Paper on the availability of contact lenses through pharmacies" and was working on developing a handout for AOA members on just what should be included in every contact lens prescription.⁴⁰ In fact, even Board members such as defendant Dr. John Gazaway were not only aware of this growing

³⁷Florida Consolidated Facts Tab 5 at A005361.

³⁸Notes from Licensure and Regulation Committee Meeting by Schneider dated September 27, 1986, Florida Consolidated Facts Tab 10.

³⁹Memo from Giroux to Eichhorst dated January 16, 1986, Florida Consolidated Facts Tab 5, supra, at A005359.

⁴⁰CLS Council Meeting , September 22, 1986. ATS 971548-1552, at 1549,1551 and 1552.

concern with mail order and pharmacy sales, they were already anticipating the need to educate the AOA membership via "strategy sessions on alternative delivery systems" to be made part of "future AOA educational meetings."⁴¹

The AOA's early efforts at utilizing the power of the prescription pad to control alternative channel sales also found expression in defendant Dr. Solomon's 1986 paper "An Rx [prescription] for a Contact Lens Rx" which, while not "official," was an approach which "reflects the opinions of the (Contact Lens) Section,"⁴² and was intended for publication in the AOA Journal as well as the AOA/CLS Newsletter.⁴³ This paper included a reproduction as well as suggestions for the use of a "Contact Lens Prescription" form used in the Solomon, Snyder and Klein offices.

This particular form was identified by the paper as specifically designed "to discourage . . . patients from seeking . . . replacement contact lenses from non-professional and untrained contact lens purveyors," even though "[a]dmittedly, many of the instructions promulgated on the contact lens prescription form cannot be legally enforced." Id. As discussed below, defendants' creation, use and dissemination to the ECP community at large of such admittedly fraudulent prescription release forms -- ones designed to limit the utility of a prescription in the purchase of lenses from alternative channels -- was not a one time occurrence. Furthermore, defendant Vistakon's document production reveals that by late 1987 Vistakon was already collecting such

⁴¹CLS Council Meeting , December 14, 1986. ATS 971541-543.

⁴²See A 005867-72.

⁴³A 004885.

articles and prescription forms for use by its sales staff with ECPs.⁴⁴

By June 1987, the AOA's State Legislation Center (SLC) had already collected information and issued "Bulletin No. 97" to all of the state associations affiliated with the AOA on the laws of various states concerning "The Sale of Contact Lenses Through Pharmacies and Mail Order."⁴⁵ In response to its members' concerns, the AOA also produced a publication for dissemination to local media and contact lens wearers entitled "Be Wary of Mail-Order Contact Lenses."⁴⁶ Other and similar anti-mail order, anti-pharmacy sales media releases followed.

The subject of pharmacy and mail order sales -- and what the AOA could do to control them -- had consumed over two years of the AOA's time by Spring of 1987,⁴⁷ and had already caused AOA legal counsel, both in house⁴⁸ and outside,⁴⁹ to voice concerns about the "antitrust implications" of any attempt to affect the dispensing of contact lenses by other than ECPs, particularly efforts to limit the dispensing of contact lenses to "only those licensed to prescribe," as such a position would possibly "encourage our members not to release the CL Rx." Id.

Nonetheless, the CLS then developed a resolution, one drafted by defendant Solomon⁵⁰

⁴⁴Vist 0148663-666.

⁴⁵Bulletin No. 97 from the Licensure and Regulation Committee dated June 16, 1987, Florida Consolidated Facts Tab 11.

⁴⁶Florida Consolidated Facts Tab 11 at A000578-79.

⁴⁷A 000055

⁴⁸A 005849

⁴⁹A 004892-93. See Eichhorst Deposition at pp. 284-300, Exhibit 24.

⁵⁰A001230; ATS 971535-539, at 539.

and passed by the AOA/CLS over the objections of the General Counsel⁵¹ for adoption by the AOA Board of Trustees as official AOA policy, that said, in part, “[I]t is the position of the American Optometric Association that the dispensing of contact lenses be provided only by eye care practitioners who are licensed to prescribe contact lenses.”⁵² This language would have barred sales both to and by opticians, who cannot prescribe contact lenses. The report and resolution were subsequently modified after Brian Klinger, the AOA Board Liaison Trustee to the CLS, raised concerns about an FTC investigation and potential “antitrust implications” with the language of the resolution.⁵³ Klinger thereafter killed the original version, not even allowing it to be presented publicly at an AOA Board meeting, “[b]ecause of recent court decisions, as well as actions before the FTC.”⁵⁴ This reveals that the AOA was aware of the potential illegality of taking coordinated steps to preclude competitors – in fact they sought to have the FTC investigate organized ophthalmology for excluding optometrists from certain post-operative care – and while they were hesitant to act against opticianry, their fellow “Os,” they didn’t hesitate to take combined steps to preclude mail order houses from sales in competition with the AOA.

A modified version of the resolution was reworted to read:

RESOLVED, that the sale of replacement or duplicate contact lenses without verification and ongoing evaluation of the contact lenses is detrimental to the health and welfare of the patient; thus, replacement or duplicate contact lenses should be evaluated on the

⁵¹A003692

⁵²Proposed Resolution, Florida Consolidated Facts Tab 12.

⁵³Memo from Klinger to Harris dated June 19, 1987, Florida Consolidated Facts Tab 13. See also Klinger deposition at 74-8, and Exhibit 2 to same.

⁵⁴A004890, Klinger Memo to Wayne Cannon, Chair, CLS, September 18, 1997.

eye by a practitioner authorized to do so pursuant to state law.⁵⁵

Nonetheless the Board of Trustees defeated the motion to adopt this version of the resolution in March 1988.⁵⁶

The AOA/CLS efforts to get an anti-mail order, anti-pharmacy sales resolution passed by the AOA next turned to support for a resolution by the California Optometric Association, which had been involved in an unsuccessful effort to have such sales either strictly limited⁵⁷ or declared illegal as matter of California state law for several years. Defendant Solomon voiced the frustration the contact lens specialists of the AOA/CLS were all feeling by this point in early 1988, i.e., because of delays by the AOA's Board "We now have drug store dispensing, 'Doc in the Boxes,' mail order, J.C. Penney catalogs, Cable T.V. and grocery store dispensing of contact lenses." Id.

At this same time, other state association members of the AOA were working in concert with the AOA itself to fight mail order and pharmacy sales of lenses. The Wisconsin Optometric Association Contact Lens Section was working on both possible state regulation of mail order and the development of "model" prescription terminology to be used to fight the alternative channels, along with giving direct advice to their members that the best way to fight alternative channels was just "not release contact lens Rx's when requested."⁵⁸

⁵⁵Memo from Cannon to Tumblin dated February 18, 1988, Florida Consolidated Facts Tab 14 at A001881.

⁵⁶Memo from Solomon to Klinger dated April 22, 1988, Florida Consolidated Facts Tab 15.

⁵⁷Letter to State Senator Montoya from the COA, April 29, 1988. A004850-51.

⁵⁸A 003891-92; ATS 971428-29; E 00007-15. W00506

In a meeting held in St. Louis on June 14, 1988 between representatives of the AOA CLS -- including defendant Jack Solomon -- the AOA Licensure and Regulation Committee, the AOA Board of Trustees and COA , the group decided upon the language of the final version of the anti-mail order, anti-pharmacy resolution and then spent the balance of the day discussing prescription release questions and whether a replacement lens actually even needed to be fitted.⁵⁹ The fact that this was to be an AOA official anti-mail order Resolution was clearly stated in the briefing given to co-conspirator Wayne Cannon, then Chair of the AOA/CLS, by co-conspirator Giroux and defendant Solomon.⁶⁰

On June 30, 1988, the AOA House of Delegates approved the AOA/CLS resolution, as proposed by the COA, which set out the desired anti-mail order, anti-pharmacy sales message in a facially more legal form, calling for

the adoption of laws or regulations prohibiting the sale of contact lenses directly to the consumer without proper patient management, examination, and ongoing evaluation by a practitioner authorized to do so pursuant to state law.⁶¹

Around the same time, the COA continued with its effort to procure the enactment of legislation to restrict sales of contact lenses exclusively to ECPs. The COA also attempted to enlist the assistance of contact lens manufacturers, including B&L, in a related effort to pass such legislation.⁶² For example, Vince Zucarro of Sola/Barnes Hind testified ⁶³ before the California

⁵⁹Z 00114-16; COA 00001015-16.

⁶⁰Giroux to Cannon June 17, 1988. A 000411-412.

⁶¹Resolution passed July 1, 1988, Florida Consolidated Facts Tab 16.

⁶²The letter dated June 1, 1988, from Robert Gordon, O.D., President Elect of the COA to Grady Deal of Wesley-Jesson states "any action your organization can take to help us battle

Senate in support of California Senate Bill 2103,⁶⁴ and in the Fall of 1988 the subject of the "Sale of Contact Lenses through Pharmacies and Mail Order Businesses" was a formal topic of presentations, including one by defendant Dr. Klein on behalf of the AOA/CLS, at the AOA's State Legislation Conference.⁶⁵ Dr. Snyder, the partner of Drs. Klein and Solomon, was also busy informing manufacturers who were considering entering the disposable lens market with their own products that they had better deal with ECPs' concerns about "the possibility of the product becoming readily available in drug stores, mail order, etc.," with an emphasis on limiting distribution to "ECP Only," arguably even to the exclusion of retail outlets in their entirety.⁶⁶ Dr. Snyder repeated similar warnings to Vistakon.⁶⁷

The AOA was determined to assist its membership in securing legislation similar to that proposed in California. In the Spring 1989 issue of the AOA publication "Making Contact," defendant Melvin J. Remba, O.D., Chairman of the AOA/CLS, noted that its members must:

Continue to assist in legislative efforts in states that are working to control the indiscriminate sale of contact lenses by non-licensed, over-the-counter

against the mail order sale of contact lenses will be greatly appreciated!!!!!!" Florida Consolidated Facts Tab 17.

⁶³Letter from Gordon to Zucarro dated June 1, 1988, Florida Consolidated Facts Tab 18.

⁶⁴Other manufacturers apparently declined. Letter from Gordon to Hal Johnson of B&L thanking him for agreeing to speak at the COA Presidents Council and urging him to testify at the Senate hearings, Florida Consolidated Facts Tab 19 at L01245-46. Letter from Johnson to Gordon declining to testify, even though Johnson had already been thanked for agreeing to testify, Florida Consolidated Facts Tab 19 at L00212.

⁶⁵A 005155-56.

⁶⁶Snyder Presentation to CIBA, Dallas, Texas, July 21, 1988. CV04398-403.

⁶⁷Vist 0122610-11.

or mail-order vendors. Resolutions must lead to action.⁶⁸

The AOA and its state associations were involved in more than just lobbying and legislative activity at this time. They undertook direct pressuring of more than just the manufacturers, bringing their influence and prestige to bear on both Amway -- which was then considering the sale of lenses by its national sales force⁶⁹ -- and Walgreen's Drugstores in Wisconsin, where in response to a letter from the ophthalmologist partner of the WOA's CLS Chairman, the chain stopped contact lens sales.⁷⁰

In conjunction with this 1988 effort to fight drugstore sales, the AOA/CLS published highly restrictive suggested prescription release forms in a nationally distributed publication authored by a member of the "AOA/CLS Study Group" (discussion, infra), and also developed localized "scripts" for ECPs to use in refusing to release Rx's, e.g., instructing them to "Use a good phone script when you get calls for CL Rx's"; "Do not give out signed CL Rx's to pharmacies!" Furthermore, the ECPs were advised to "[d]iscuss this issue with your CL (manufacturer) sales 'reps' and put pressure on them. Ask what they are doing about this."⁷¹ Clearly every manufacturer was aware if these developments, including B&L, and they had heard about these ECP efforts and concerns before releasing their new lenses and the new sales policy to go with them.

⁶⁸Florida Consolidated Facts Tab 21.

⁶⁹A 003044-45; A 04572-73. AOA to Amway: "Don't."

⁷⁰A000110.

⁷¹Wisconsin Optometric Association "Dear W.O.A. Colleagues" Letter and enclosed "scripts" from AOA files. A002258-63, emphasis added.

On the legislative side, in September of 1988 defendant Dr. Remba appointed defendant Dr. Solomon to act as the liason between the AOA and the COA in seeking to support passage of California Senate Bill 2103, the COA's effort to control mail order contact sales in California.⁷² The COA wing of the AOA was particularly aggressive on this issue, as both Vistakon and B&L -- which had not yet released its new Seequence lens -- certainly had reason to know.

B&L Adopts a "New" Anti-Mail Order Sales Policy

Hal Johnson, President of B&L, came to California in August 1988 to speak at the annual Vision West ECP Trade Show and Conference, and at that time he was confronted by leaders of the COA complaining that B&L lenses were being sold by mail order houses located in California, particularly Dial-A-Contact Lens of La Jolla, California ("DACL"). Johnson denied such sales, only to be informed shortly thereafter that B&L did sell to DACL. In fact, B&L did so with DACL being a direct account of the company.⁷³ This fact was readily discoverable by B&L's senior management; all they had to do was simply ask their sales staff.⁷⁴

In fact Johnson was soon made aware -- if he wasn't before -- that several other traditional soft lens manufacturers had taken a "hands off," "no sales" position with regard to DACL solely "because of the pressure applied by the California Optometric Association." Johnson was informed that DACL had nonetheless grown and increased its sales, and that "this is one of the reasons why the COA is so insistent upon getting industry support in fighting the battle" against

⁷²04452; A005621.

⁷³Memo, August 25, 1988, from Dave Reischer, Manager of Professional Affairs, to Hal Johnson, B&L 000581-82.

⁷⁴See B&L 000581-82, Exhibit 6, Johnson Deposition April 25, 1996.

mail order, even when the mail order operation in question was -- as clearly known to B&L -- "well within the law as far as dispensing lenses." See fn. 74, supra.

B&L's staff, which regularly dealt with the AOA and its state associations, kept Hal Johnson informed with regard to the growing anti-mail order sentiments from the ECP community.⁷⁵ In fact B&L's sales staff was provided with promotional materials to provide to their ECP clients which materials were designed to react to these precise ECP concerns.

One example is The Communicator, a Summer 1988 newsletter which informed ECPs that the soon-to-be-released Seequence lens, B&L's "Disposable Lens Option," which was being advertised as "a lens replacement program with the eye care professional in mind," would include "coded lens parameters to strengthen patient control" (i.e., so a patient couldn't use the prescription information on the lens box to order a replacement lens) and "abbreviated expiration dates to encourage patient compliance" (i.e., artificially short lens life expirations stated on the packaging, to send patients back to the ECP sooner than it would otherwise be necessary).⁷⁶

Against a backdrop of such communications and pressures -- once again, pressures brought to bear on B&L before the national launch of their new disposable lens and development of its accompanying sales policy -- Hal Johnson planned to come to California to speak to the COA's Presidents' Council in October, 1988.

In this speech before the leadership of the largest state association of optometrists in the

⁷⁵Reischer to Johnson, September 12, 1988. B&L 000579-80

⁷⁶DC 00348-49, emphasis added.

country,⁷⁷ Mr. Johnson knew that he would have to deal with the "very difficult position (of B&L) as it relates to the optometrists and maybe even ophthalmologists" and their opposition to the admittedly legal sales operations of DACL⁷⁸ -- which by then had been a direct sales account of B&L for over two years -- and he had to "determine (B&L's) position" on this conundrum before he spoke. (See B&L 00582-83, fn. 74, supra, emphasis added).

This identified and stated need of the President of B&L to make such a decision clearly reveals that as of August 25, 1988, B&L had no set mail order sales policy for its yet to be launched Seequence lens, a historic statement of reality which is clearly contrary to B&L's current statement of the facts in their pending motions.

The very first documentary instance that B&L can point to which even mentions mail order sales is to be found in a "Sales Bulletin" of September 21, 1988. In that document -- one issued after all of the above described events -- B&L revealed that its company position was not that mail order sales were in violation of B&L's sales policy, but that "The concept of replacing a patient's lens through the mail by someone other than the fitter/prescriber is in direct violation of our policy." (See Exhibit 6, "Appendix to Defendant Bausch and Lomb, Inc.'s Memoranda in Support of its Motions for Summary Judgment Against Plaintiff States"). Thus not all mail order sales were forbidden, just those by competitors of the defendant ECPs.

Another stated purpose of this September 21, 1988 "Sales Bulletin" was to gather more

⁷⁷Johnson Speech, October 8, 1988, Lake Tahoe, California. B&L 00032306-316, emphasis added.

⁷⁸See Reischer to Johnson Memo of September 12, 1988, with enclosed AOA News article of September 1, 1988 "COA seeks law to block mail order contact sales," B&L 000579-80, Reischer Deposition Exhibit 13, July 19, 1995.

information from the field staff about other accounts the sales staff knew were, or thought to be, operating mail order operations. Id. Apparently Hal Johnson didn't want to repeat the mistake he had made before the COA leadership in August of 1988 when he had claimed B&L was not selling lenses to mail order houses.

Interestingly, even when Seequence was launched, the B&L's "Policy," of January 1989 (Exhibit 7 to B&L's "Appendix," supra) once again contains no mention of mail order per se. This made sense, as B&L continued to sell its lenses directly to mail order houses for months, and in some cases, years thereafter.

In his October 1988 COA speech Johnson -- addressing the "Future of the Contact Lens Industry" -- first indicated that the "market is going to change," "the question is . . . how we're going to deal with it." He pronounced that "A new industry is emerging out of the large growing wear base - replacement lenses. The business is surfacing in Drug stores, Mail Order houses and small shops," and then noted that "Frustrated practitioners are looking to the manufacturers to stop selling their products to these new channels of distribution and to the legislators to enact laws to stop this kind of selling." Id., fn.77, supra. Thus B&L's highest leadership publicly and clearly acknowledged the "message" from the ECPs, i.e., pressures being brought to bear on B&L by ECPs concerning where these new lenses were to be sold, in advance of the release of the new B&L disposable lens.

After mentioning that some ECPs were already prescribing away from lenses that could be found for sale in the alternative channels -- thus acknowledging that B&L's new lens could suffer that same fate -- Johnson identified a series of reasons why consumers preferred to shop the alternative channels, such as price, convenience and a highly mobile population. He then

urged the ECPs to adapt their practices and services accordingly and warned the audience that the “Key word is control” and that “Disposable lenses will move to the drug store unless today’s practitioners control their patients.” Id.

Perhaps of greatest significance, this speech -- to the largest ECP state association in the country, one openly looking for manufacturers to support its anti-mail order/anti-drugstore efforts -- omitted what should and would have been logically included, had B&L already had an established sales policy to tout to the assembled group. While he agreed that B&L and the ECP community “will need as no other time to work closely together,” (fn.77, supra) Johnson’s remarks did not contain a statement, or even mention, of B&L’s supposedly “longstanding,” pre-existing sales policy” (B&L Motion for Summary Judgment, passim).

This extraordinary lacunae is further evidence of the material dispute between the parties on the question of whether B&L really had a “pre-existing” sales policy at the time it launched its new Seequence lenses, i.e., one existing before the ECPs pressured B&L not to release the new lens without an “ECP Only” policy, or did B&L merely use the same words to describe what was in fact a new policy, this time accompanied by promises of new sales practices as well, all the result of changes brought about by the ECP pressures described above

AOA/State Association Mail Order/Pharmacy Activity

Throughout this period the AOA was active in co-ordinating state association activity on mail order and pharmacy matters. The AOA’s Board and the AOA/CLS – specifically including defendant Mel Remba – were co-ordinating state association efforts to “fight against the sale of

contact lenses in pharmacies,⁷⁹ because "Replacement lenses are big business for eye doctors who sell the lion's share of that market" and, as Remba stated, the AOA, in dealing with both the pharmacy and mail order threats, "wants a system that forces the patient to go back to the eye doctor periodically before a contact lens Rx can be refilled."⁸⁰

The AOA knew that there was "no specific location in federal law which specifically requires a prescription for the dispensing of contact lenses."⁸¹ Accordingly, the AOA -- specifically including defendants Drs. Yamane, Remba and Solomon -- acted to promote alternative means of controlling mail order, particularly by dealing with prescription release/content control issues at the state level.⁸² The AOA/CLS's Administrative Director and named co-conspirator, Dr. Art Giroux, later described the AOA's function with regard to seeking realization of the mail order resolution in a February 2, 1990 memorandum detailing how the AOA provided technical assistance to the COA and other state optometric associations to help them obtain passage of legislation "prohibiting the sale of contact lenses." The AOA had also developed and distributed information papers on, and generated news articles about, health problems allegedly associated with alternatively supplied lenses. It also addressed and highlighted supposed issues concerning the sale of contacts by alternative suppliers with "concerned individuals and organizations," all the while attempting to "promote development of

⁷⁹Klinger to Remba Memo, October 3, 1988. AOA 04478.

⁸⁰20/20 Magazine, November 1988, "AOA Eyes Pharmacy CL Sales." A002162.

⁸¹Giroux to Klinger Memo, November 28, 1988. AOA 04776-81.

⁸²Contact Lens Section Council Meeting, December 9-10, 1988, Item 6 (e) ATS 971526-7.

laws and regulations restricting the sale of contact lenses obtained in this manner.”⁸³

The vast scope of even the early the AOA/state optometric association co-ordinated efforts to fight mail order/drugstore sales through whatever means possible can be seen in the efforts of the ECPs to fight prescription release by suggesting ECPs establish office procedures designed to “minimize the likelihood of patients seeking replacement contacts from pharmacies or other alternative outlets.”⁸⁴ This was not a “maverick” activity, rather it involved the aid and assistance of, among others, the Wisconsin Optometric Association, the California Optometric Association, the Michigan Optometric Association, the Illinois Optometric Association, Tom Eichhorst, General Counsel of the AOA, defendant Dr. Jack Solomon of the AOA/CLS, and the AOA/CLS Study Group, the Chair of which published a nationally circulated set of prescription “non-release” forms for use by ECPs, including in mandatory prescription-release states. *Id.* Once again, ECPs were advised by their leadership that the best way to deal with this “growing threat” was to “keep the prescription from leaving the office in the first place.” *Id.*

One of the most interesting “forms” was that developed by defendants Solomon, Snyder and Klein. Dr. Snyder is a well-known practice management expert, with expertise which had resulted in his being a paid lecturer for “almost every contact lens manufacturer that I [Snyder] can think of.”⁸⁵ He was also a prolific and well-paid author, with Vistakon and several other

⁸³Florida Consolidated Facts Tab 22 at A004760.

⁸⁴E.g., Edwards WOA Memo, December 2, 1988. E 00144-46. See also E 00086-88.

⁸⁵Snyder Deposition October 23, 1998 Page 18, ll. 7-25; page 394, Exhibit 60.

manufacturers⁸⁶ paying for his articles. Furthermore, he was recognized as the originator of the "Frequent Planned Replacement" concept, the lens replacement modality which gave rise to B&L's Seequence lens. With such fame and experience to support his doing so, Dr. Snyder and his partners created a very unusual and very widely published and re-published "Contact Lens Prescription" form.⁸⁷

Dr. Snyder's form was used not only in his Ft. Lauderdale, Florida practice, but was also cited and distributed by the ECP defendants as an exemplar prescription form, one for other ECPs to utilize or emulate. This repeated publication occurred over a multi-year time frame and in both national trade and professional publications,⁸⁸ including two editions of a nationally cited practice management publication by the Chair of the Study Group of the AOA/CLS.⁸⁹

What makes this particular prescription form most interesting is not just that it was specifically designed by Snyder to make it difficult for a patient to use to purchase replacement lenses elsewhere than her ECP. Using this form to buy lenses was difficult, at best, and that is exactly what Dr. Snyder had intended: "We have instituted a policy which effectively

⁸⁶Snyder Deposition October 23, 1998 Page 376 et seq. See also Vistakon "Current Article Reprints," including two from Dr. Snyder, that Vistakon's sales staff used to promote Acuvue. J 12444

⁸⁷AOA produced document, AOA 02385, Snyder Deposition Exhibit 107.

⁸⁸Snyder Deposition, page 401 et seq. Exhibit 62, Contact Lens Spectrum, September 1988.

⁸⁹"Malpractice and Contact Lenses," Dr. Harvey Rosenwasser, April 1988 Edition, Remba Deposition of November 13, 1998, Exhibit 32; "Malpractice and Contact Lenses, An Updated Edition,": Dr. Harvey Rosenwasser, 1991 Edition, Remba Deposition Exhibit 33. Cited as an "excellent book" for its collection of forms, and used as a template, in the January 1993 Optometric Management. W 00135

discourages purchasing lenses elsewhere.” (Id., at 405.)

What is most revealing about the form is that it shows just how far the defendant ECPs would go to fight mail order and drugstore sales, as the content of the form – which is replete with references to laws and regulations and possible prosecutions if these laws and regulations are not followed – is a deliberate fabrication. At pages 405 through 408 of his deposition, Dr. Snyder admits that he, Solomon and Klein had no legal basis for the various prescription use restrictions set out in the form. In fact, to quote Dr. Klein on the same subject, “There was no legal basis. . . We just made it up...”⁹⁰

**The Manufacturers’ Purported Post-1988 Policy of Restricting
Sales of Disposable Contact Lenses to ECPs**

After the full scale introductions of the Vistakon Acuvue and B&L Seequence lenses, the AOA did not limit its crusade against discounters to legislative lobbying efforts. It also sought and obtained the cooperation of the contact lens manufacturers. An example is the endorsement of the AOA’s June 1988 Resolution “regarding drug store and mail order sales of contact lenses” provided by the Contact Lens Manufacturers Association in February of 1989 and passed along to state associations for their information and possible use.⁹¹ In particular, the AOA/CLS -- including defendant Doctors Remba, Rigel, Solomon, and Yamane -- was active in developing “Position Papers” on disposable lenses, Contact Lens “Guidelines,” planning for a survey on Mail Order contact lenses (discussion, *infra*) and meeting with other ECP groups -- particularly the Contact Lens Association of Ophthalmologists -- to discuss this problem and possible

⁹⁰Klein Deposition, October 21, 1998, at page 610, ll. 21 and 23.

⁹¹Letter from Carl Moore, President of CLMA to named co-conspirator Dr. James R. Scholles, President of AOA, February 14, 1989. AOA 04638; L 01184.

solutions.⁹²

Another example was the continued participation of AOA leaders in the ongoing Advisory Panel process, such as the Vistakon Panel which met again in May of 1989, after the national launch of Acuvue. This meeting was held both to provide Panel members with information to use in speaking about the product, "to encourage their colleagues to prescribe Acuvue more frequently," and to get feedback from these well informed ECPs.⁹³

That meeting was attended by defendant Yamane, who eventually gave five paid speeches in Florida and seven in California as well as "several across the country" to help market the new Acuvue lens to the ECP community, all told speaking to ECP groups as many as 30 times. Also attending were defendants Solomon and Rigel, along with several named co-conspirators. The specific subjects discussed included the threat of drugstore sales and techniques to "block out" same. Another subject was the possibility of ECPs and Vistakon jointly "policing" the marketplace, i.e., first finding out "What organizations were diverting ACUVUE and [then] cutting off the diverters' supply."⁹⁴

This latter discussion was particularly interesting in light of the fact that Vistakon's senior management knew that Vistakon was selling its lenses -- both its lathed lenses directly, and its Acuvue lenses through an authorized distributor -- to alternative channels such as Professional

⁹²AOA Contact Lens Section Council Meeting Minutes, February 25, 1989. ATS 97152020 and 23.

⁹³"Notes Relating to May Advisory Panel Meeting," J 4688-4706.

⁹⁴Yamane Deposition, December 3, 1998, p. 27, ll. 21-25; p. 28, l. 1; Yamane Deposition March 30, 1995, Exhibit 12.

Contacts on Call, a pharmacy drop-ship alternative channel.⁹⁵

C. The Fall 1989 Meetings and Agreements

On July 31, 1989, Defendant W. David Sullins, Jr., O.D., then President of the AOA, wrote a letter to Bernard Walsh, President of Vistakon, and, responding to Walsh's earlier oral invitation, requested the opportunity for AOA's leadership to visit Vistakon.⁹⁶ Walsh responded on August 31, 1989 by inviting representatives of the AOA Board and the AOA's Industry Relations Committee to attend a "long range planning meeting" between the AOA and Vistakon at Ponte Vedra Beach, Florida on October 4 and 5, 1989.⁹⁷ AOA President Sullins also successfully sought a meeting with B&L, which agreed to host a meeting with the AOA officials in Rochester, New York at the end of September, just prior to the Vistakon meeting.⁹⁸

The AOA meeting was of special significance to Vistakon because it was very interested in the prospect of obtaining a "Seal of Approval" from the AOA – one similar to that which the American Dental Association had bestowed upon Crest Toothpaste, which as a marketing tool had greatly increased Crest sales. Vistakon wanted to use such a "Seal" for its Acuvue product in future consumer advertising.⁹⁹ In fact, when Walsh extended his August 31st invitation for a

⁹⁵Ward to Yadon Memo, June 15, 1989 BJ 1459-60; Yadon Deposition October 27, 1998, Exhibit 3, page 118.

⁹⁶Florida Consolidated Facts Tab 23.

⁹⁷Florida Consolidated Facts Tab 24.

⁹⁸Interoffice B&L Memo from Reischer to Kanaley dated August 25, 1989, Florida Consolidated Facts Tab 25 at 00030172-75.

⁹⁹Russell to Chapman, July 25, 1989, Vist 0148176. See also Scott to Russell, October 31, 1988, Vist 0148179-184.

proposed October 4-5, 1989 meeting, he was aware of the AOA's plans to formalize their "Seal of Approval" protocol at their planned October 1989 AOA Board meeting.¹⁰⁰

Prior to the scheduled meetings between the AOA and the defendant manufacturers, both B&L and Vistakon were selling contact lenses directly to alternative suppliers, although both manufacturers had sales policies purporting to authorize sales of lenses only to ECPs.¹⁰¹ For example, Dial-A-Contact Lens (DACL) was a direct account of B&L.¹⁰² DACL was also a direct account of Vistakon as early as 1988¹⁰³ and continued to be a direct account even for disposable lenses until after the Fall 1989 meeting with the AOA¹⁰⁴ despite the fact that Vistakon personnel knew it was a mail order house.¹⁰⁵ Moreover, the Vistakon sales representative for that account testified that he did not consider selling contact lenses to DACL as violating any Vistakon sales policy¹⁰⁶ and he serviced the DACL account like any other account.¹⁰⁷

Vistakon's sales to DACL were not isolated incidents. Lens Express, the largest mail

¹⁰⁰Wechsler to Walsh, et al., August 11, 1989, Vist 0148139.

¹⁰¹See, e.g., Sales Bulletin of September 21, 1988, Florida Consolidated Facts Tab 2; Memo from Hayes to Walsh of August 29, 1988, Florida Consolidated Facts Tab 3.

¹⁰²Florida Consolidated Facts Tab 26 at 0002297-2301.

¹⁰³Squeglia Deposition at 129-133; Vistakon invoice, Florida Consolidated Facts Tab 27.

¹⁰⁴Letter from Preston to Hundt dated May 25, 1990, Florida Consolidated Facts Tab 28.

¹⁰⁵Brennan Deposition at pp. 28-30. Although Dial-A-Contact was owned by an optician, its very name confirmed what all knew: Dial-A-Contact was a mail-order house. Id. at 33.

¹⁰⁶Brennan Deposition, at 35-36.

¹⁰⁷Brennan Deposition, at 20-22.

order house in the United States, had established a direct account with Vistakon in 1987.¹⁰⁸ The Ultimate Contact, another mail order house, was also a direct account of Vistakon.¹⁰⁹ In addition, Contact Lens Supply, an organization that provided contact lenses to pharmacies, bought Vistakon contact lenses with Vistakon's full knowledge through Norm Ginis, O.D., an Ohio optometrist and a direct Vistakon account, in 1988 and early 1989.¹¹⁰ CLS was also a direct B&L account.¹¹¹ In fact, prior to the initial 1989 meeting with the AOA, neither Vistakon¹¹² nor B&L¹¹³ even had any regular or formal procedures to ascertain whether a customer was a mail order house. It appears as though both Vistakon and B&L wanted to be able to tell ECPs that they had no way of knowing where diverters were getting lenses, while actually being fully capable of obtaining this data at any time, if they only asked their sales staffs.

The record thus reveals that even though Vistakon and B&L had conspiratorially adopted sales policies facially purporting to restrict sales of lenses to ECPs prior to September and October of 1989, there is no evidence that these policies were in fact in these manufacturers' minds either designed to prevent or actually successful in preventing sales of any contact lenses,

¹⁰⁸Letter from Squeglia to Lens Express dated February 3, 1987, Florida Consolidated Facts Tab 30.

¹⁰⁹Letter from Squeglia to The Ultimate Contact dated August 29, 1989, Florida Consolidated Facts Tab 31.

¹¹⁰Ginis CID Statement, pp.21-25; letter from Squeglia to Ginis dated November 27, 1989, Florida Consolidated Facts Tab 32.

¹¹¹B&L Sales Management Reports, Florida Consolidated Facts Tab 90.

¹¹²Squeglia Deposition, at pp. 29-32, 48.

¹¹³See Hollison Deposition, at pp. 19-20, 82-85.

traditional or disposable, to mail order houses and pharmacies.

Vistakon's summary judgment memorandum as to Florida reports that a 1987 (actually, 1985) study by an outside consultant (the "McKinsey Report")¹¹⁴ recommended that Vistakon "not give serious consideration to pharmacies or mail order houses. . . as a distribution channel because many 'major states' restricted the dispensing and selling of contact lenses to ECPs."¹¹⁵ This quotation is misleading at best.

What Vistakon fails to disclose is the McKinsey Report's actual, unequivocal conclusion that consumers' preferred low cost and convenient methods of obtaining their disposable lenses such as through pharmacies and by mail. Vistakon also omits the McKinsey Report's conclusion that distribution through ECPs was the least favored method of distribution.¹¹⁶ In the Liability Report on behalf of Plaintiff States, Professor Greer extensively discusses the contents and recommendations of these two McKinsey Reports, i.e., both the 1985 and 1988 versions. (See Greer Liability Report, pp. 36-38, at fn. 16, supra.)

Moreover, although Vistakon's arguments in support of its claim that its sales policy was "in Vistakon's independent economic self interest" depend very heavily upon a citation to one of the McKinsey Reports' conclusions with regard to the alleged "clear illegality" of drug store and mail order sales of lenses in certain key states, Vistakon does not explain why it never bothered to check actual laws of these states, since even the most cursory check would have revealed that

¹¹⁴The McKinsey Report was a marketing study commissioned by Vistakon to recommend the best way to distribute its brand new product, the disposable lens.

¹¹⁵Vistakon Memorandum at 4-5.

¹¹⁶McKinsey Report, Florida Consolidated Facts Tab 34 at V05534.

McKinsey's legal conclusions were in error.¹¹⁷

The national introduction of disposable lenses by Vistakon in 1988¹¹⁸ meant, as was discussed above, that there was to be a new product entering the marketplace for vision correction. The record also reveals that accompanying this new modality would be rapid growth in a potentially high profit market for replacement contact lenses, that is, supplies of lenses that patients would need to purchase somewhere to replace their original supply of lenses. These patient purchases would occur in the time period prior to the patient's next regular eye examination appointment with the ECP. It was the identity and nature of this "somewhere" that the patient would purchase her replacement lenses that was the economic crux of this market development.

The emergence of this new replacement lens market was not lost upon the AOA ECP defendants. Nor was it lost on these same AOA ECPs that the markups on packages of disposable lenses would not come close to equaling the markups that had been available to them as profit on a single set of conventional lenses.¹¹⁹ The lenses themselves were much cheaper and the product itself was extremely price sensitive.¹²⁰

In response to the emerging disposables market, on June 24, 1989, at a meeting of the

¹¹⁷For example, distribution of contact lenses by pharmacy and mail order was legal in Florida at the time (Fla. Stat. § 484.002(3) (1985)), although the report stated otherwise. The same was true in California. See State of California's "Response in Opposition to Motion for Summary Judgment Against California's Antitrust Claims," filed herewith.

¹¹⁸Kunkle depo. at 23.

¹¹⁹Eye Quest magazine article, Florida Consolidated Facts Tab 36.

¹²⁰See McKinsey Report, Florida Consolidated Facts Tab 34 at V05514.

then newly elected AOA/CLS Council in New York City -- including defendants Rigel, Yamane, and Remba -- the Council reviewed a then recently undertaken survey designed by defendant Jack Solomon, O.D.,¹²¹ the quality of which will be discussed below. The purpose of the survey was to identify what ocular health problems arose from patients filling their contact lens prescriptions by mail order or other alternative channels. In connection with this issue, defendant Lee Rigel, O.D., then Vice - Chairman of the Council, was authorized by the AOA/CLS to "send a letter to manufacturers requesting their views on mail order contact lenses."¹²² Consistent with normal procedure, the minutes referring to the survey and manufacturer letters were approved at the next meeting of the AOA/CLS Council on September 16, 1989.¹²³

Meanwhile, the AOA continued its efforts at the state level to fight against alternative channels by affecting prescription release issues. An example is how Tom Eichhorst, AOA's General Counsel, Art Giroux, Administrative Director of the AOA/CLS, and Steve Miller, a non-lawyer AOA staff member in St. Louis, acting in response to a request from the New Mexico Optometric Association's Executive Director, Doris Conley, took it upon themselves to edit and re-write an "Opinion Letter" of the N.M.O.A.'s outside counsel on the question of whether a patient in New Mexico was entitled to a copy of her contact lens prescription. The editing shows that Eichhorst et al. wanted to have the New Mexico Association take the position that "in compliance with New Mexico law" an ECP does not have to release the prescription except to

¹²¹Dr. Solomon was a CLS Council member who had been actively attempting to put Lens Express out of business. Memo from Solomon to Giroux dated March 22, 1990, Florida Consolidated Facts Tab 37.

¹²²Minutes dated June 24, 1989, Florida Consolidated Facts Tab 38.

¹²³Giroux CID, Part 2 at 299-300.

another ECP, even though when asked under oath whether that actually was the law in New Mexico, Eichhorst had to answer "I don't know that."¹²⁴

D. 1989 AOA Meetings to Enlist Manufacturers in the Conspiracy to Eliminate Sales to Discounters

1. The AOA-B&L Meeting

The scheduled meeting between the AOA officials and Bausch & Lomb executives took place on September 28, 1989 in Rochester, New York. AOA defendants James C. Leadingham, O.D., John "Bucky" Gazaway, O.D., L. Edward Elliott, O.D., Richard Hopping, O.D., Rigel and Sullins each attended this meeting.¹²⁵ From the outset, this meeting was designed to be a serious session, with Dr. Sullins asking B&L to skip the typical "tours, etc." Instead, Sullins had "very specific ideas of how [B&L] can support the profession" and he wanted "discussions to center around how Bausch and Lomb and the A.O.A. can work together in the future."¹²⁶

The draft minutes of the meeting do indicate that certain joint Industry/Profession policy considerations regarding B&L's sales of contact lenses to pharmacies and drug stores were discussed.¹²⁷ At the meeting, B&L and the AOA discussed specific strategies for working together to develop a master plan for the impact of disposable lenses upon the ECPs. B&L and

¹²⁴See AOA 03562-66, Eichhorst Deposition, February 11, 1999, at pages 539-549, Exhibit 71.

¹²⁵Memo from Leadingham to Sullins dated October 17, 1989, Florida Consolidated Facts Tab 70. At that time, Leadingham was AOA's Secretary-Treasurer, Gazaway was President-Elect, Sullins its President, Elliott its Vice President, Hopping its past President and current Chairman of its Industry Relations Committee, and Rigel was Chairman of its CLS Council.

¹²⁶Memo to McDermott from Reischer, August 25, 1989. Reischer Deposition July 19, 1995, Exhibit 16, Doc. 00030171.

¹²⁷Hopping's typewritten notes, Florida Consolidated Facts Tab 40.

the AOA also discussed ways of ensuring that contact lenses were dispensed only by prescription -- and thus only by O.D.s or M.D.s -- that prescriptions should be in writing , and further discussed a peculiarly medical question of what should go into that written prescription, including whether "it should be valid for a designated period of time (90 days) on product or a prescription and that brand substitution not be permitted." ¹²⁸ All of these prescription related subjects are not normal topics for a discussion between a medical device manufacturer and its medical professional customers. B&L -- aware, as was Vistakon, of the commercial value of the AOA's good will and support -- also discussed the question of the proposed AOA "Seal of Approval."

In fact, Dr. Sullins recalled that "[a]n assurance that Bausch & Lomb would not mail disposable contact lenses directly to the patient" was given to the AOA as a direct result of that meeting, and in turn the AOA agreed to help B&L in policing of ECPs who were abusing B&L's lens return policy.¹²⁹ Moreover, Hal Johnson, the President of B&L, acknowledged that the AOA and B&L "need to lean on each other and not be bashful about saying what's on our minds," with a "good illustration" of same being the success that was had at the meeting "in establishing an open dialogue " and the "candor" "sharing our thoughts relating to mail order contact lens and drug store dispensing."¹³⁰

Another of the defendants, Dr. Leadingham, recalled that B&L and AOA shared an "area

¹²⁸Id.

¹²⁹Memo from Sullins to Board of Trustees, October 3, 1989, Florida Consolidated Facts Tab 41.

¹³⁰Letter from Johnson to Hopping, October 16, 1989, Florida Consolidated Facts Tab 42.

of mutual concern" that "ophthalmology and optometry may be on different sides over the issue of pharmacies dispensing disposable contact lenses"¹³¹ The potential for having to make choice of marketing decisions that such an obvious split between two of the O's reveals -- O's only, or O's plus pharmacy sales -- calls into question B&L's assertion that its distribution policy as regards pharmacies, i.e., no such sales, had been necessitated by a need to address the dispensing concerns of all ECPs. Further, one of the AOA attendees at the meeting, defendant Rigel, wrote to defendant Hopping, another AOA attendee at the meeting, about it as follows:

My memory was jogged yesterday on the subject of pharmacy dispensing of contact lenses after reading a letter from an irate O.D. in Michigan addressed to Vistakon. It seems a chain drug store in his area listed Acuvue lenses on a contact lens display.

In any case, I remember the conversation we had with the Bausch & Lomb people in Rochester on the subject and whether we could jointly influence this practice. I would like to pursue this further.¹³²

On the same day that the AOA defendants arrived in Rochester for the meeting, B&L, after years of selling its lenses to the firm, decided to stop selling lenses to Dial-A-Contact Lens under its "Fresh Lens Program," which was B&L's then "hot" marketing program for ECPs,¹³³ B&L nevertheless continued to sell its other contact lenses directly to DACL for several more years, thus clearly and knowingly violating its claimed "longstanding," "pre-existing" sales policy.

//

¹³¹Memo from Leadingham to Sullins, October 17, 1989. AOA 03873-76, 02076-79.

¹³²Florida Consolidated Facts Tab 43 (emphasis supplied). See generally Hall Liability Report at 22-23, Florida Consolidated Facts Tab 47.

¹³³Hal Johnson Deposition, April 25, 1996, Exhibit 20. DC 00317/B&L 00019026.

2. The AOA-Vistakon Meeting

On October 5, 1989, merely one week after having met with B&L, the AOA followed up with the scheduled meeting with Vistakon at Ponte Vedra Beach, Florida. The meeting agenda called for discussion of both the "AOA Seal of Approval" and "Drugstore Concerns."¹³⁴ AOA Defendants Hopping, Sullins and Elliott attended this meeting.¹³⁵

The AOA's meeting with Vistakon proved to be productive, as had their meeting with B&L. Multiple agreements were achieved between the AOA and Vistakon, the terms of which were memorialized in a letter from Phillip Keefer, an Vistakon's Executive Vice President, to AOA President Sullins, four days after the meeting adjourned, to wit:¹³⁶

Working together to eliminate diversion¹³⁷ of ACUVUE lenses, we will do several things:

- * Change our labeling to state ACUVUE is: "For prescription use only by a licensed optometrist, ophthalmic physician or optician in the following states . . .". We also want to include the word "unlawful" in the statement.
- * Vistakon plans to send a letter to major pharmacy associations making them aware of this labeling and that we intend to enforce it.
- * The AOA will send a copy of this letter with AOA endorsement to the membership for their use to discuss this policy with local pharmacies whenever necessary.

¹³⁴AOA Meeting Agenda dated October 5, 1989, Florida Consolidated Facts Tab 44.

¹³⁵See Florida Consolidated Facts Tab 44.

¹³⁶Florida Consolidated Facts Tab 39.

¹³⁷"Diversion" refers to the transfer of contact lenses to a person or entity that is not authorized to receive them under the manufacturers' sales policies. "Eliminating diversion" is thus synonymous with the elimination of sales of contacts to alternative channels of distribution.

- * AOA will also send the letter to state optometric associations and commend Vistakon for this support.
- * Additionally, AOA will interview Bernie Walsh or myself on this topic and publish it in the J.A.O.A. [Journal of the American Optometric Association].
- * Vistakon will also provide the letter to our sales force to use with pharmacies when necessary.
- * We also discussed our giving the names of optometrists who are confirmed diverters to the AOA so that you could discuss this behavior with state boards for further action. It was agreed that Richard Hopping would check with your legal counsel to determine if this would be possible.¹³⁸

Subsequently, Dr. Hopping (Chairman of the AOA's Industry Relations Committee and an attendee) demonstrated his clear belief that the AOA and Vistakon had reached agreement on a course of action to eliminate sales to the alternative distribution channels. In an October 23, 1989 letter to Vistakon's Keefer, Dr. Hopping included his "comments on each of [Keefer's] stated conclusions" with regard to the agreements reached at the meeting, and suggested that they talk at some later date if it was necessary to "clarify and resolve any existing variations."¹³⁹ Later, Dr. Hopping asked Keefer whether "we have any differences in our interpretation that needs [sic] to be clarified."¹⁴⁰ No such differences seem to have existed as no changes or clarifications were forthcoming.

Many, if not most, of the steps deemed necessary to either eliminate or police diversion

¹³⁸See Fn. 136, supra, Florida Consolidated Facts Tab 39.

¹³⁹Florida Consolidated Facts Tab 45 at A003202.

¹⁴⁰Letter from Hopping to Keefer dated November 10, 1989, Florida Consolidated Facts Tab 46.

that were discussed at the October 5, 1989 meeting were in fact subsequently carried out by the parties to the agreements.

Pursuant to its agreement with the AOA to eliminate diversion, Vistakon changed the labeling of the Acuvue lenses to read, "This label is not a prescription" and "unlawful to dispense without a prescription."¹⁴¹ Vistakon also sent letters to six pharmacy trade associations discouraging pharmacy sales of Acuvue and indicating that its lenses "can only be obtained through licensed eye care practitioners."¹⁴² Significantly, Vistakon, after taking pains to publicly announce a policy of selling its lenses only to ECPs or authorized distributors who sold to ECPs,¹⁴³ then further announced its intent to cut off any purchaser who resold Vistakon lenses to non-ECPs.¹⁴⁴

To report on Vistakon's progress in upholding its end of the agreements reached at the October 5 meeting, Philip Keefer wrote to Dr. Sullins on December 21, 1989. Keefer reported

¹⁴¹Vistakon contends that the decision to change the labeling of Acuvue was made prior to the October 5, 1989 meeting with the AOA, but has not produced one shred of documentary evidence that this decision was in fact reached prior to the meeting. Two Vistakon executives testified that any decision to change the labeling was made prior to the meeting, but surely if their testimony were accurate, there would be documentary evidence supporting it. See Vistakon Memorandum at 7, Keefer Deposition at 387-88, K. Hayes depo. at 127-28. There is no such documentary evidence. On the contrary, in discussing the labeling change in his letter of October 9, 1989 (four days after the meeting adjourned), Vistakon's Keefer states, using the future tense, "[W]e will...[c]hange our labeling...." and "We also want to include the word 'unlawful' in the statement." In fact the internal "Vistakon Copy Clearance" process -- which all such changes must undergo before public release -- does not reveal that any such review was begun until well after the meeting date, on approximately October 25, 1989. See Rogaski February 3, 1999 Deposition, Exhibit 10, pp. 103-09,115. See also, Koberna Deposition at pp. 24-27, 50-58.

¹⁴²Florida Consolidated Facts Tab 48 at V01759.

¹⁴³Florida Consolidated Tab 48 at V01765-66.

¹⁴⁴See "Vistakon to Diverters: We're on to You," Florida Consolidated Facts Tab 49.

on Vistakon's end of the bargain: "as we discussed in our meeting in Jacksonville last month, Bernie Walsh has sent the attached letters [stating, inter alia, that ACUVUE lenses are available only through ECPs] to the following pharmacy trade associations . . ." Having cited the sending of the letters as "another example of our commitment at Vistakon to support optometry," Keefer then requested that the letters be published in the Journal of the American Optometric Association (JAOA) and that he be interviewed by the JAOA editorial staff.

"As we agreed," Keefer continued his recitation with the statement that "Vistakon sales representatives will be provided a copy of the [no pharmacy sales] letter to give to optometrists for use as a reference with any drugstores in their area." He then asked Dr. Sullins to mail copies of the same letter, with an "AOA endorsement," to AOA members to show "our efforts to support them." Keefer then concludes his letter by stating: "I hope we can continue working closely together in a way that mutually benefits the AOA and Vistakon."¹⁴⁵

Thus Keefer's letter confirms that five of the seven points of future action agreed to by the AOA and Vistakon at the October 5th meeting and then outlined in the October 9, 1989 letter from Keefer to Sullins had already been accomplished as of December 21, 1989.

E. The Parties' Post-1989 Meetings Efforts to Eliminate Alternative Distributors

1. The Immediate Aftermath

Following a test program earlier in the year,¹⁴⁶ by Fall of 1989 Vistakon had begun using

¹⁴⁵Florida Consolidated Facts Tab 48 at V01758.

¹⁴⁶The "Vistakon, Inc. Distributor Test Program" had included restrictions on participating distributors which prohibited all sales of Vistakon Products to "any organization. . . that sells Vistakon contact lens products to a patient without a formal eye exam and fitting by a licensed dispenser within the State of operation." Vist 0001954-5, point 3, pg. 0001954. This extremely restrictive language was dropped from the final version of the Contract which

a Distributorship Program to service some of its accounts.¹⁴⁷ These distributors would eventually fuel the grey market by selling replacement lenses to alternative distribution channels without authorization, so that mail order and pharmacy suppliers of lenses had other ways they could obtain replacement lenses for resale, although not on terms as favorable as buying directly from manufacturers.¹⁴⁸

Shortly after the AOA's meeting with Vistakon, the axe fell on direct sales of Vistakon lenses to alternative channels of distribution. First, Thomas Squeglia, a Vistakon vice-president who had attended the October 5th meeting, sent a letter to Dr. Norm Ginis on November 27, 1989, cutting off sales of contact lenses to Contact Lens Supply. Ginis, who had long since disclosed the nature of his contact lens supply business to Vistakon representatives, wrote in anger and astonishment, "I told my rep that we would be selling these through CLS [Contact Lens Supply] as we provide every brand and type of contact lens."¹⁴⁹ Likewise, Lens Express was barred from opening an Acuvue account even though it had long had a direct sales account for Vistakon's conventional lathed soft lenses.¹⁵⁰

This particular fact is strange, given that Vistakon's justification for not selling Acuvue

established the Distributorship Program in 1989, with the "fitter" restriction not to return until Spring of 1992. Discussion, infra.

¹⁴⁷Binion Deposition at 55.

¹⁴⁸See, e.g., Harkleroad Deposition at 540-42.

¹⁴⁹Florida Consolidated Facts Tab 32.

¹⁵⁰Letter from Yesil to Hayes dated January 10, 1991. Florida Consolidated Facts Tab 50. Vistakon's conventional lenses, Hydromark and Vistamark, predated the introduction of disposable lenses.

lenses to mail order houses was – and apparently still is, at least in part – that to do so was a risk to the eye health of the patient. In fact, Phillip Keefer testified with regard to the “sales policy” that “the rationale for our policy was patient health.”¹⁵¹ Despite this supposed concern and reasoning, Vistakon nonetheless sold its lathed lenses, the Vistamarc and Hydramarc lenses – which Dr. Klein described as allegedly requiring greater medical care and attention both in original fitting and follow up than do disposable lenses -- to Lens Express, Dial-A-Contact Lens and Professional Contacts on Call. When queried why, Keefer admitted that “We (Vistakon) were launching Acuvue. We were paying no attention to those brands.” Id. at pages 177-78. A specific example of this disregard for supposed ocular health concerns is that while Dial-A-Contact’s account for Acuvue was also summarily closed,¹⁵² its lathed lens direct account remained open.

Within weeks of Vistakon sending out its letters to the Pharmacy Associations, AOA provided Walsh with the agreed upon and desired interview and publicity, in this instance on the front page of the January 15, 1990 AOA News.¹⁵³

Very shortly after this front page story ran in the AOA’s publication, defendant Sullins told the ECP community at large via another news story in the national trade press that the AOA would follow up on its “policing” agreement with Vistakon, albeit indirectly. When interviewed, Sullins made it clear that, although the “AOA is not in the enforcement or policing business,” nonetheless while “[W]e have no jurisdiction across state lines. . .if we learn who’s diverting,

¹⁵¹Keefer Deposition, February 22, 1999, p. 14, ll. 14-15; pp. 177-78.

¹⁵²Letter from Preston to Hundt dated May 25, 1990, Florida Consolidated Facts Tab 51.

¹⁵³See V 00097-98

we're happy to facilitate," such policing activity by AOA's state affiliates which, having been advised of the alleged acts by the AOA, "then would relate them to state boards of examiners," which would be in a position to act on reports of diversion.¹⁵⁴ Thus by February 1990, the AOA and Vistakon had each lived up to its part of the agreements reached the previous October in Jacksonville.

In addition to pressures from the Optometric community, Vistakon was also hearing from major leaders among the Ophthalmologists – specifically including members of its Acuvue Advisory Panel, and the officers of CLAO, the Contact Lens Association of Ophthalmologists. These ophthalmologists were advising Vistakon in no uncertain terms that a failure to control diversion of Acuvue could lead to organized boycotts by the MD/ECP community.¹⁵⁵

Steps were also being taken by both the AOA and B&L to further cement the agreement reached between them at their September 28, 1989 meeting. B&L coded the parameters of its disposable lenses on the lens package to prevent patient "shopping" for replacement lenses.¹⁵⁶ It

¹⁵⁴"Vistakon to Diverters: We're on to you," Vision Monday, February 12, 1990, AOA 10122-23. Senior Vistakon sales staff told their sales representatives that they could use this article to deal with ECP concerns on pharmacy sales, to show that Vistakon "is clearly first in taking a leadership position designed to eliminate unauthorized distribution . . . [while] The real solution is a joint effort among manufactures [sic] and professional organizations to address this problem." Yadon Memo, February 21, 1990, J 1398-1400.

¹⁵⁵See "Acuvue Diversion" Memo, S. Wechsler to Binion, et al., concerning a threat relayed by Dr. Jim Atwood, CLAO Officer and member of Acuvue Advisory Panel ("a number of practitioners at a meeting he attended said they would no longer prescribe Acuvue because the lenses were available at the Price Club.") (V 01718); See also letters from Dr. Perry Binder, CLAO Past President, November, 1989 complaining re Price Club sales, and Vistakon's response. V00300-304.

¹⁵⁶B&L later had difficulties with FDA regulations and the burdens the system placed on its customers, and eliminated the practice. Letter from Archer to Guthrie, dated April 5, 1991, Florida Consolidated Facts Tab 52.

also began a program to detect accounts that provided lenses to mail order firms and pharmacies by marking the products sent to them¹⁵⁷ and changed its packaging to make diversion more difficult.¹⁵⁸ As noted above, on September 27, 1989, B&L had terminated the Fresh Lens account¹⁵⁹ of Dial-A-Contact, effectively precluding its sales of the new B&L disposable contact lens.¹⁶⁰ B&L also issued a press release some time later, indicating that its policy was one of "distributing its contact lenses solely through licensed eye care professionals, including optometrists, ophthalmologists or opticians, where permitted by law."¹⁶¹ The "public" posture of B&L as being against alternative channels was, therefore, well established, but the reality was and continued to be quite different.

Within one week of the B&L meeting, the AOA -- as discussed during the meeting -- developed and publicized a "white paper" setting out its position on contact lens prescriptions.¹⁶² The white paper stated that only ECPs should be allowed to dispense contact lenses: "The dispensing of contact lenses should be provided only by eye care practitioners who are licensed

¹⁵⁷Memo from Krbec to McDermott dated August 28, 1991, Florida Consolidated Facts Tab 53.

¹⁵⁸Id.

¹⁵⁹"Fresh Lens" was a program instituted by B&L to compete with Vistakon's disposable lens. Under the program, the patient's lenses were automatically replaced at intervals prescribed by the doctor. Hollison Deposition at 10.

¹⁶⁰Letter from Johnson to Hundt dated September 27, 1989, Florida Consolidated Facts Tab 7.

¹⁶¹Florida Consolidated Facts Tab 54.

¹⁶²Letter from Giroux to Bartlet dated October 3, 1989, Florida Consolidated Facts Tab 55.

ot [sic] prescribe contact lenses.”¹⁶³

2. The AOA Defendants’ Letters to Other Manufacturers To Endorse Restraints

After Vistakon made its various policy announcements in December of 1989,¹⁶⁴ the AOA used those announcements to convince other manufacturers -- even companies which did not then have a disposable lens in the market -- to announce similar policies. AOA defendants Lee Rigel (then Chairman of the AOA’s CLS Council) and Stanley Yamane, O.D. (the then Secretary of the AOA/CLS Council), acting pursuant to the authorization of the AOA given at the June 24, 1989 meeting in New York, wrote to Thomas Steiner (Senior Director for International and Professional Marketing at Wesley-Jessen), B.J. Shannon, O.D. (Executive Director for Professional Services and Customer Support at CIBA Vision) and Bruce M. Ford (Vice President and General Manager at Cooper Vision).¹⁶⁵ Dr. Rigel also had Dr. Yamane write to Dr. Len Lazwell, Director of Scientific Information Services and Mr. Richard Haugen, President of Allergan Optical and to Vincent Zucarro, O.D., of Sola/Barnes Hind asking each to “join” in the “campaign” “Vistakon recently launched” and to affirm the following statement:

“In order to emphasize the importance X, Y, Z Co. places on the professional evaluation of contact lenses, we endorse the dispensing of contact lenses only by licensed optometrists, ophthalmologists, or

¹⁶³Id. at A000226 (emphasis in original). As noted above, one class of ECPs, opticians, is not licensed to prescribe contact lenses, thus this position was a call for manufacturers to boycott even fellow ECPs.

¹⁶⁴Letter from Keefer to Sullins dated December 21, 1989, Florida Consolidated Facts Tab 56.

¹⁶⁵Cooper Vision was a small manufacturer of contact lenses. See Bender CID at 10-12.

opticians, where allowed by law.”¹⁶⁶

The Rigel letter to Steiner went even further:

Specifically, Tom, the AOA CLS is planning to distribute to its members a listing of those companies that adhere to this above stated philosophy.¹⁶⁷

Each of the above firms duly and promptly responded affirmatively to the request, in several instances using the precise language proposed by the AOA¹⁶⁸ B&L waited to reply until June of 1990, when it issued a Press Release: “Bausch & Lomb Reiterates Policy on Sale of Contact Lenses,” which responded to both generalized ECP statements of concern about such sales, as well as to the AOA/CLS request for a manufacturer to issue a statement on selling its lenses only to ECPs.¹⁶⁹

F. The AOA “Health Concerns” Survey and Report to the FDA

On December 19, 1989, the AOA publication “Making Contact” published a completely

¹⁶⁶Florida Consolidated Facts Tab 58 at A000200, 201 and 208. Yamane’s Motion for Summary Judgment against Plaintiff States claims that he was not aware that his letters were part of a AOA/CLS sanctioned action, yet Yamane’s letter to Lazwell states: “Lee Rigel, our CLS Chairman, has asked me to be responsible for contacting your firm,” to be part of a AOA/CLS effort “to encourage other manufacturers to join in this effort” already undertaken by Vistakon. Id.

¹⁶⁷Florida Consolidated Facts Tab 61(emphasis supplied). Curiously, Dr. Yamane’s summary judgment memoranda as to both the Plaintiff States and Florida does not quote the underlined passage.

¹⁶⁸Florida Consolidated Facts Tab 58 at A004774, A000217, A004769, A000208, A000216, A004863.

¹⁶⁹B&L News Release, as drawn from AOA’s file, A 000021-22. See also B&L document, 00030118, Wal-Mart VIP Trip Position Paper: “Eyecare practitioners are very vocal in their resolve not to do business with a contact lens manufacturer who sells directly to a pharmacy.”

misleading news article concerning a purported survey conducted by the AOA¹⁷⁰ The article reported, falsely, that “[S]ixty percent of those who obtained their lenses through unconventional sources were found to have clinical problems”¹⁷¹ and generally indicated that significant health risks were associated with the purchase of replacement contact lenses by mail order.¹⁷² Arthur Giroux, the AOA/CLS Administrative Director, supplied the information.¹⁷³ As discussed below, there was no meaningful survey and no basis for the stated conclusions, and the AOA knew it.

Shortly after the publication of the article, named co-conspirator Dr. Scholles, the immediate past president of the AOA, gave a short presentation to the U.S. Food and Drug Administration (FDA) at a meeting on contact lens compliance and public education.¹⁷⁴ At that meeting, Dr. Scholles disseminated the same misleading survey data previously reported in “Making Contact.” Dr. Scholles reported to the FDA that lenses obtained from alternative sources compromised vision in 45% of those patients who obtained their lenses from such suppliers. Additionally, Dr. Scholles stated that alternative-source lenses produced ocular

¹⁷⁰Florida Consolidated Facts Tab 6.

¹⁷¹Id.

¹⁷²Id. See also Giroux depo. at 215-30, 237-42.

¹⁷³Giroux Deposition at 215-30, 237-42. The source of the information was a survey commissioned by the AOA, with defendant Dr. Jack Solomon identified as the author. Statistics obtained by the Mail Order, Pharmacy and Grocery Store survey referenced in the June 24, 1989 AOA/CLS Council meeting were compiled in July of 1989, Florida Consolidated Facts Tab 62. The staff of the AOA had included a survey form in the Spring Quarter issue of “Making Contact” a publication sent to every member of the AOA/CLS. Id. The survey received an extremely limited response, but the AOA/CLS decided to make the most of the results.

¹⁷⁴Memo from Scholles to Sullins dated January 30, 1990, Florida Consolidated Facts Tab 60. Scholles Deposition at 75.

pathology in 27% of patients who obtained lenses from mail order, that 27% of the alternative source lenses were damaged, and that brand substitutions occurred 40% of the time.¹⁷⁵

These representations by the AOA to the FDA were false. Dr. Scholles failed to tell the FDA¹⁷⁶ that the percentages he used were not the numbers of patients who reported these types of problems but rather the numbers of optometrists who reported they had one or more patients who reported the enumerated problem.¹⁷⁷ He further failed to mention that only 4.3% of the optometrists surveyed (147 out of 3,413) responded and therefore it was utterly impossible to determine if those responding were typical or just had an axe to grind.¹⁷⁸

The magnitude of the misrepresentation can be seen only by example. Examining the findings reveals that of the 4.3% of the AOA/CLS membership who responded (147 optometrists out of over 23,000 AOA optometrists nationally), only 62 had patients who purchased contacts by mail order. Of the 62 O.D.s who had patients who bought replacement lenses by mail order,

¹⁷⁵Id. Dr. Scholles would not admit, when deposed, to providing the FDA with the information contained in his presentation outline, even though he attached this outline to his report to defendant Dr. Sullins when reporting on the FDA session. Furthermore, the AOA News reported that Scholles' remarks to the FDA concerning the survey were taken from the outline. See Scholles Deposition, March 28, 1996. See also, AOA News Release, February 15, 1990. Florida Consolidated Facts Tab 59.

¹⁷⁶The record reveals that Dr. Scholles obtained this AOA/CLS survey information from a document authored by Giroux who had made a backup outline in case Scholles could not make the meeting. Giroux Deposition at 209. Scholles never checked the accuracy of the statistics. Scholles Deposition, at 86-87.

¹⁷⁷Giroux depo. at 181-82. The survey merely asked the optometrist if he had a patient who had obtained lenses from alternative sources. If the optometrist had such a patient or patients, the optometrist was asked generalized questions about what happened to that patient or patients. No data were obtained on a patient-by-patient basis.

¹⁷⁸Among the respondents were Jack Solomon, the survey's designer, and other familiar AOA anti-mail order members. Scholles Deposition, at pp. 107-08.

45% (or approximately 28 patients) reported that their vision “was compromised.” What was meant by “compromised vision” was not defined in the survey but was defined by Dr. Giroux in his deposition as visual “acuity” being reduced.¹⁷⁹ Giroux admitted that merely meant the patient could not see as well as before.¹⁸⁰

The survey in no way revealed either the number of patients whose visual acuity was reduced or the percentage of the patient population purchasing replacement lenses by mail order whose visual acuity was reduced.¹⁸¹ At most, the survey revealed only that perhaps as many as 28 patients in the entire United States during an unspecified period of time suffered some sort of contact lens related problem (such as a scratched lens or a lens of the wrong power) which caused them not to see as well as before. Each of the statistics is subject to the same analysis. For example, 27% of the optometrists surveyed reported one patient who had experienced ocular pathology associated with mail order lenses. That would translate into approximately 16 patients in the entire United States with one episode of “ocular pathology” (meaning, according to Dr. Giroux, a departure from normal health in one or more eyes¹⁸²) during an unspecified time period. Finally, and most outrageously, the survey did not ask the same questions as to ECP-dispensed lenses. Consequently, there is no way of knowing from the survey if mail order

¹⁷⁹Giroux Deposition at 191-93.

¹⁸⁰Id.

¹⁸¹Giroux Deposition, at pp.192-193.

¹⁸²Giroux Deposition, at 193.

dispensing was more or less "harmful" than ECP dispensing.¹⁸³

Perhaps the best way to properly describe the AOA/CLS survey is to note what the author and designer of the survey had to say about it. When questioned, Dr. Solomon -- after initially denying that he could even recall the survey, then denying that he was in fact the author of same, and then finally recalling that he "very well could have" written the survey and "If, indeed, I didn't design it, obviously it had my approval" -- was asked whether he would consider it a scientifically valid survey, stated -- this time without equivocation -- "No." In fact, when specifically asked "would you consider it (i.e., the AOA's survey as presented to the FDA) to be a fair and honest representation of the actual state of medical affairs that it purports to represent?," Solomon responded "No, Sir."¹⁸⁴

G. The 1991-92 AOA and CLASS Meetings/ Agreements Concerning Increased Supply Restriction Enforcement Against Alternative Channels

1. 1989-1990 Market Developments

It became obvious over time that the methods chosen to eliminate diversion, as agreed to in the 1989 meetings, and the AOA's subsequent attempts to enhance the agreements with actions of its own, such as the letters from AOA Drs. Rigel and Yamane, were not as effective as the AOA defendants -- particularly the AOA/CLS and CLASS activists -- had wished. Another round of meetings designed to correct this failing were to occur in both late 1991 and early 1992.

¹⁸³There is some evidence that the AOA learned its lesson about using a "survey" to support its anti-mail order activities. In 1992, when it contemplated doing another similar survey, the AOA abandoned the idea in part because "we may not get the data we want." See discussion, infra, at page 77, fn. 238.

¹⁸⁴Solomon CID Statement, October 8, 1996, Exhibit 8, at p. 95, l. 6; at pp. 213-14; at p. 216; at p. 221, ll. 1-5.

In between times, the ECPs' concerns with alternative channels and the manufacturers' awareness of the availability of their lenses through such channels were regularly reported on in the trade press.¹⁸⁵ The AOA was active both in doing whatever it could to stop certain mail order operations -- such as those of Contact Lens Supply¹⁸⁶-- and generally in providing its constituent associations and members with anti-mail order information for public dissemination¹⁸⁷ The AOA was also collecting information about alternative channel sales and diverters to be in turn provided to the manufacturers for their action.¹⁸⁸

Nonetheless, many state association efforts aimed at stopping mail order met with failure, such as in California. There in June of 1990 the sponsoring State Senator for the COA's "anti-mail order" legislation withdrew his bill once he concluded that the bill "would serve economic interests rather than protect public safety," that the COA's intent was "an attempt to write out other businesses regarding contact lenses," and, to quote from the Senator's aide, he had determined that the bill would have advanced the interests of one party in "a battle for an

¹⁸⁵Vision Monday, April 9, 1990, "Alternative Route Distribution: Drugstore CIs and the Profit Motive," AOA 10124-26, specifically mentioning Contact Lens Supply and Professional Contacts on Call.

¹⁸⁶See AOA 03328, letter from Illinois Optometric Association to individual optometrist concerning AOA's "attempting to stop the mail order sales of an Ohio supplier, Contact Lens Supply."

¹⁸⁷See October 26, 1990 Letter from AOA General Counsel Eichhorst to attorneys for the COA, enclosing "News Release" entitled "Mail Order Contact Lenses Have Drawbacks, Association Says," A 002990-92.

¹⁸⁸See Letter of September 7, 1991 from Dr. Pirozzlo, President, Optometric Society of New York City, to Jan Dorman, New York State Optometric Association, complaining about a diverter, which document was produced from the files of Ellen Preston of Vistakon. (J 4672.)

economy and market rather than the consumer safety issue he had intended it to be.”¹⁸⁹

The sale of replacement lenses through pharmacies also continued to grow during this period,¹⁹⁰ and complaints about this development were being made to the manufacturers as well as to state ECP associations who sought to obtain state enforcement action against such sales.¹⁹¹

By late 1991, the AOA defendants began focusing their efforts on what they believed to be a better way to deal with mail order/pharmacy sales than merely seeking passage of statutes or regulations designed to limit the impact of increasing consumer purchases of replacement lenses elsewhere.¹⁹² While the ECPs would continue to make such efforts, their real emphasis shifted to pressuring the defendant manufacturers to do even more to stop the alternative channels.

CLASS is Formed

The CLASS organization -- a nationwide assembly of some 75 optometrists, all of the members of six different practice management groups joined as one -- had been formally organized by 1990. At its November 1990 meeting in Jacksonville, Florida, the fight against alternative channel sales was a major topic for discussion by, among many others, defendants Drs. Klein (who was the main organizer of the event), Rigel, Snyder, and the then Chairman of the AOA/CLS, Dr. Solomon.¹⁹³ These ECPs who made up CLASS -- all of whom were also

¹⁸⁹See Vision Monday, June 18, 1990, page 12. OD 04977; 00007939.

¹⁹⁰See July 25, 1990 CIBA Memo , CB 01130-41.

¹⁹¹See Vistakon Customer Relations Data Collection Form , October 2, 1990. J 2113.

¹⁹²See AOA 03905-7, September 1991 AOA Licensure and Regulation Committee Projects on “Contact Lens prescriptions and release of prescription.”

¹⁹³Agenda and Roster, CLASS Meeting, November 1990. 0000024-33; C-000098-103.

members of the AOA and in almost every instance, the AOA/CLS as well -- were uniformly recognized by the manufacturers to be "big hitters" in the optometric community, e.g., "[a]ll of the O.D.'s attending are influential, practice professionally and have very substantial gross incomes," so much so as to justify a special letter to the group from Hal Johnson at B&L and a special invitation from Vistakon to at least one attendee to come to Jacksonville and "have his brain picked" on what is and will be happening in the disposable lens market.¹⁹⁴

Meanwhile -- and in clear contradiction of the claim now made by B&L in its Summary Judgment papers that it has consistently recognized that direct sales to mail order houses and pharmacies were inconsistent with its sales policy-- even in late 1990 the B&L sales department was unsure whether it needed "to take some action regarding any orders that are placed for these accounts" clearly identified as Norman Ginis' C.L.S. and Dieter Hundt's Dial-A-Contact Lens.¹⁹⁵

Vistakon and the AOA -- including defendant Dr. John Gazaway -- had met from time to time during this period and discussed such matters as "Distribution of Disposable Lenses through Vistakon" and "The Future of Disposable Lenses and Frequent Replacement,"¹⁹⁶ but clearly the

¹⁹⁴Shannon to Walts Memo, November 5, 1990, re "Super Dirty Dozen Meeting." CV 08011-14.

¹⁹⁵See November 12, 1990 Memo from Glerum to Krbec, V-P Marketing and Sales at B&L 00084. See also, Winslow to Russ Daniel, B&L Memo of January 14, 1991, Re "CLS, Inc. of Ohio, B&L acct #57017, operates in the Phar-Mor and Walmart stores in the Florida District." C0000874

¹⁹⁶Business Meeting Agenda December 10, 1990. 02068. There in fact were meetings between Vistakon and the AOA/CLS "Long Range Planning Committee" in Fall of 1991, but despite discovery requests of all parties for such documents, neither AOA nor Vistakon would or could produce any records of same.

results of these discussions didn't satisfy the ECPs. Meanwhile, even though aware of both the ECPs' concerns and their own distributors' major role in supplying Acuvue lenses to diverters, Vistakon -- while talking about the issue internally -- did virtually nothing to act either formally or effectively against diversion in 1991. Instead Vistakon appeared to be content merely to refer complaining ECPs back to the 1989 meetings had with AOA and CLAO and then reference the promised policing of diverters agreed to in those discussions.¹⁹⁷

Bausch & Lomb was almost as ineffectual during this period. All the while it sold lenses to the alternative channels, B&L intentionally misled ECPs who complained about diversion by claiming that B&L didn't know how the diverters were obtaining their lenses. B&L did mention that it had tried to prevent consumers from "shopping" for lenses at alternative channels by removing prescription information from the packaging -- using a code only -- but had been foiled by the FDA.¹⁹⁸ B&L nonetheless promised ECPs that it was still looking at ways to keep the consumer from using his prescription information "while at the same time [we] adhere to FDA requirements," all the time claiming "We (B&L) share your concerns about the impact of mail order replacement and are continually exploring ways to eliminate the channel" and urging ECPs to work with the AOA to prevent mail order businesses from operating. Id.

Again, the reality of B&L's sales practices, as opposed to its claimed and misleading "sales policy," can be summarized in one short document, a note to Hal Johnson on May 20, 1991 from Jerry Krbec, his Vice-President for Marketing and Sales. In response to some inquiry

¹⁹⁷See Draft April 5, 1991 "Dear Dr." letter. V 03541; see also Walsh letter to Dr. Berner, Utah Optometric Association, September 20, 1991. Walsh Deposition Exhibit 27, J 5405-7.

¹⁹⁸Archer to Guthrie letter, April 5, 1991. BLF 000032-33, emphasis added.

about sales of B&L lenses, Krbec wrote:

Hal,
This is really C.L.S. doing mail order not just selling
to drugstores. Whould (sic) we take action?
C.L.S. is a large account.
Jerry

B&L thus knew that their direct sales account, C.L.S., was not only selling B&L lenses to drugstores but was selling as a mail order house as well. The question that was posed was not how could this happen, but rather, should we do anything to stop this and thus risk losing a "large account"¹⁹⁹ Given this record of saying one thing and doing another, it was no surprise that the defendant ECPs decided to step up the pressure on the manufacturers to finally do something meaningful and effective about alternative channels.

a. The Fall 1991 Vistakon-CLASS Meeting

The first in the next round of known conspiratorial meetings, ones which resulted in even further restrictions in the marketplace by reducing the competition which ECPs were still facing from the alternative channels, was one held in November 1991 between Vistakon and CLASS at the Phoenician Resort, Scottsdale, Arizona.²⁰⁰ This trade association of influential optometrists was familiarly (and not inaptly) known in the contact lens industry as the "Dirty Dozen" or sometimes "Super Dirty Dozen."²⁰¹ Many of the ECPs who made up CLASS were also

¹⁹⁹BLF 000213.

²⁰⁰CLASS is an acronym for Contact Lens and Anterior Segment Society, a defendant in this action.

²⁰¹Yamane March 30, 1995 Deposition, at 186-87.

influential members of the AOA/CLS, including many officers and several past chairs.²⁰²

Although it had both attended and financially sponsored both previous CLASS meetings, by early Fall of 1991, Vistakon -- despite having been requested to attend and financially support the November CLASS conference many months previously -- had not yet replied to the invitation of these powerful ECPs to come and discuss the "state of the industry," including "What direction are the suppliers [i.e., manufacturers] moving the contact lens industry," "Is mail order and drug store dispensing of contact lenses in the best interests of the contact lens industry" and "Are the CL 'movers and shakers' and the suppliers 'moving and shaking' in harmony?"²⁰³

When no reply had arrived by early October, defendant Dr. Ron Snyder, partner of conference organizer Dr. Klein and Dr. Solomon -- and a practice management specialist in his own right, one whom Vistakon had used to launch the Acuvue lens and who was known for his similar work on other disposable lenses -- wrote Vistakon's President a "Dear Bernie" letter.²⁰⁴ This letter was a statement of a threatened economic boycott of Vistakon, a boycott to be lead by Snyder, Klein, Solomon and the CLASS practitioners, not only of the then new Acuvue 8.4

²⁰²For example, Drs. Wayne Cannon, Lee Rigel, Jerry Lieblein and Jack Solomon were all past, or then current Chairs of the AOA/CLS, as well as leaders of CLASS practice management groups, while Cannon, Solomon, Melton, Rigel, Kame and Yamane were CLASS, AOA/CLS and Vistakon Advisory Panel members in 1991. See Vist 0140865-66. Dr. Yamane denies that he was a member or ever attended a CLASS meeting, but at least Dr. Klein, one of CLASS' organizers, identified Yamane as a CLASS member to Vistakon (Klein Deposition, p. 551, Exhibit 44) and testified that holding membership in one of the practice management groups which made up CLASS meant Yamane was a member of CLASS. Id., at 599, Exhibit 53.

²⁰³See CLASS agenda, Keefer's copy, J8604-10, at 8606.

²⁰⁴See original version A0600113-5, and Keefer's annotated version, J8614-16. Explanation of the notes at Keefer CID Statement, Volume II, August 12, 1993, at pages 79-109. Snyder wrote an almost identical letter to B&L's Russell Daniels on October 19, 1991. 00030694-96.

model lens and Surevue lenses, but more generally of Acuvue: "It seems as though the Acuvue bubble has burst." Id.

Snyder notes that an ever increasing number of Acuvue patients "are asking for written Acuvue prescriptions in order to purchase lenses elsewhere," as "Frank discussions . . . reveal their intention to purchase from mail order or even cheaper sources." Id. Snyder indicated that this had lead to such "frustration" that "our motivation to prescribe or renew Acuvue programs has fizzled." Id.

Snyder next told Walsh that "These market trends are not isolated to our practice. Discussions with many of our colleagues has revealed similar experiences." Having set the stage, Snyder then flatly stated:

"Because of our role as early Acuvue innovators, our colleagues are turning to us to help them cope with the erosion of their Acuvue market. Unless we can get some answers in the very near future, we might be the 'first in, first out'. With no other alternatives, I suspect that my colleagues will follow suit." Id.

Snyder, noting his awareness of Vistakon's "ECP Only" sales policy, went on to state:

"This is not enough! I believe it will require extraordinary measures to reverse this downward spiral of the Acuvue market. The salvation of the disposable lens market will require an eyecare practitioner/manufacturing partnership and a willingness to be aggressive and dynamic." Id

Snyder then repeated the invitation from CLASS to Vistakon to attend the CLASS conference where "Approximately 70 of Optometry's contact lens 'movers and shakers' will be in attendance to help chart our course for the future." Id. Vistakon decided to attend, and contributed \$15,000.00 for the pleasure of doing so.

Snyder's letter threat of an ECP led boycott was not the first or, for that matter, last time

that Vistakon and B&L heard from the ECP defendants that such a development was not only in the realm of the possible, it was a real possibility. In an interview article published in Eye Quest magazine in 1991 entitled "O vs.O: Should contact lenses be dispensed in drugstores?", Dr. Norm Ginis of C.L.S. and defendant Dr. Lee Rigel, Past Chairman of the AOA/CLS, were asked why shouldn't Vistakon, CIBA, and B&L, all of which "are strongly committed to disposable lenses (which) are virtually 100% reproducible," sell directly to the public and not just through ECPs. Rigel, who was then serving on Vistakon's Advisory Panel, replied simply:

"Because, if they do, they will be cut off from the (ECP) professional community so quickly that they will lose their source of prescribing practitioners. . . No company would want to antagonize the optometric community because optometrists are the major prescribers of contact lens. It would be devastating to their whole market position."

Even Ginis said: "I agree that the companies would be cut off."²⁰⁵

Philip Keefer, Vistakon's Executive Vice President, and Ellen Preston, another top Vistakon sales executive, then met with CLASS representatives in Phoenix, Arizona on November 8, 1991.²⁰⁶ According to a memo written by Preston and handwritten notes of Keefer, various methods of restricting the supply of contact lenses to alternative suppliers and the demand for contact lenses from alternative suppliers were discussed with these ECPs, including :

(1) hiding product names and lens specifications from customers through removable labels or bar coding on the lens package; (2) production of private label lenses which could only be purchased from the prescribing ECP; (3) advertising campaigns for manufacturers urging patients to see their eye care practitioner; (4) letters from Vistakon to patients urging them to see their eye care

²⁰⁵CV 20078-83. Florida Consolidated Facts Tab 36.

²⁰⁶Keefer Deposition, February 8, 1995, at page 206.

practitioners; and (5) having patients enter year-long contracts for lenses.²⁰⁷

Keefer's contemporaneous notes mention the word "boycott" next to "No D[irect] M[ail]" and made reference to an apparent attempt to publicly discredit the largest mail order house, "Lens Express - make it known that this bus. is funded by drug \$. The owners are in jail."²⁰⁸ In his Florida CID statement, Keefer was asked to read his notes, including that portion dealing with the word "boycott," which he read as follows:

Do you recommend contact lenses to your patients? No D.M. [direct mail] boycott. More R and D [research and development]. More advertising. Want industry to advertise contact lenses to the general public. More options. New technology et cetera. Eliminate negative impressions. Advertise, slash, tell consumers they should buy their lenses from eye-care professionals. Legal, question mark. Plus three years....²⁰⁹

When asked what the word boycott referred to, Keefer confirmed the obvious meaning of the term next to "D[irect]-M[ail]":

A: Again, I'm -- recollecting -- I'm speculating that it was relative to mail order continuing to supply lenses.²¹⁰

Preston's notes of the CLASS meeting state:

A few ECP's stated they were willing to fit a product of lesser quality if it would better tie the patient to the practice, such as a privately labeled lens. This included a threat to refit current

²⁰⁷Memo from Preston to Caldareña dated November 21, 1991, Florida Consolidated Facts Tab 64; Keefer notes, Florida Consolidated Facts Tab 65.

²⁰⁸Florida Consolidated Facts Tab 65 at V04934.

²⁰⁹Keefer's Florida CID Statement, Vol. 2 at 118-19.

²¹⁰Keefer's CID Vol. 2 at 125-26. In later deposition testimony, Keefer tried to retreat from his prior testimony and stated that the word "boycott" meant something different from its dictionary definition (Keefer Deposition at 226-31), but it is for the jury to weigh Keefer's notes and conflicting testimony.

Acuvue patients, if they would be less vulnerable to mail order suppliers.²¹¹

The meeting with Vistakon had its desired effect. Three days later, on November 11, 1991, Vistakon's Management Board meeting minutes reflect that CLASS's forceful tactics had persuaded Vistakon to tighten the noose on alternative channels.

CONTACT LENS ASSOCIATION (C.L.A.S.S.) - P.R. Keefer discussed ECP concerns regarding their inability to maintain Acuvue patients due to lower price from alternative sources ("grey market").

As a result of that discussion, C.H. Scott [a Vistakon Vice President of Marketing] agreed to initiate a tracking study to monitor "grey market" (mail order, pharmacies having ECP's, etc.) size and growth. C.H. Scott also indicated his desire to track patient inclination to seek this type of outlet.²¹²

Within a few days, Dr. Sheldon Wechsler, the Vistakon employee in charge of dealing with organized optometry had already requested that the 1991 CLASS conference roster be sent to him by Dr. Klein.²¹³ Wechsler then wrote a note to his newly hired assistant, Dr. Yamane, who had been hired to assist Wechsler in Vistakon's dealing with the ECP community. Defendant Dr. Yamane was the then AOA/CLS Council Secretary and AOA/CLS Chairman-Elect, and although he "resigned" from the AOA/CLS Council in November 1991, that resignation wasn't actually effective until June of 1992. Dr. Wechsler asked Dr. Yamane the following:

The CLASS group has gotten concerned about losing patients to mail order outfits, drug stores and other groups that sell disposable lenses. They say they want private label lenses or some other way

²¹¹Florida Consolidated Facts Tab 64 at 1324 (emphasis supplied).

²¹²Florida Consolidated Facts Tab 66.

²¹³Fax Transmittal form, with CLASS roster, Klein to Wechsler, V01624-29.

to stop patients from going to such outlets. They were pretty forceful according to Phil Keefer who spoke with them at their Arizona meeting recently.

Do you have any special input about their views? Do you have any idea about what we can do? Let's get together to discuss the issue.²¹⁴

On November 14, 1991, Bruce Sherman, a Vistakon employee and registered nurse, and co-conspirator Dr. Walter West, then President of the CLASS organization, talked by telephone. As memorialized on a Vistakon customer relations department data collection form, the substance of the conversation was that Dr. West and Vistakon's Keefer had met to discuss a strategy to deal with the alternative channel Lens Express:

CLCSS REC #140 380 LENS EXPRESS LENS EXPRESS. PHONE MAIL REQUESTING CALL BACK. 11/18 SPOKE WITH KAREN AT ECP'S OFFICE. THE ECP IS NOT AVAILABLE. LEFT MSG IN WITH 800# WITH KAREN AND REQUESTED THE ECP CALL. DR. WEST CALLED AND SAID HE HAD BEEN TO A MEETING WITH P. KEEFER AND A STRATAGY [sic] HAD BEEN DISCUSSED TO DEAL WITH LENS EXPRESS. THE ECP SAID HE HAD DISCUSSED THIS WITH HIS REP [i.e., his Vistakon sales representative] AND IT WAS REP WHO HAD CALLED. HOWEVER THE ECP SAID HE WAS PLEASED THAT VISTAKON HAD CALLED TO FOLLOW-UP REGARDING THIS. THE ECP SAID HE HAD WRITTEN DIRECTLY TO P. KEEFER [sic]. ADVISED THE ECP THAT AS HE HAD COMMUNICATED DIRECTLY WITH P. KEEFER, WE WOULD FOWARED [sic]. THIS COMMUNICATION TO HIM. FILE CLOSED, BLS, RN²¹⁵

Phil Keefer even went out of his way to let the CLASS leadership know – this time in writing to co-conspirator and Vistakon Advisory Panel member Dr. Barry Farkas – that there was

²¹⁴Florida Consolidated Facts Tab 67. Again, Dr. Yamane's summary judgment memoranda fail to describe this letter or acknowledge his dual role of acting as a Vistakon employee and an active officer of the AOA/CLS. In fact, Yamane's Motion papers, at page 4, fn. 5, clearly fail to disclose this fact. This special, two masters positioning afforded him a unique opportunity to share his fellow ECPs' interests with his employer, Vistakon, while making certain that each understood where the other's concerns should take them both.

²¹⁵Florida Consolidated Facts Tab 68.

no question whatsoever that Vistakon "got the message about patient retention and I can assure you it is an active issue at Vistakon."²¹⁶

b. The AOA-Vistakon Meeting

Pre-Meeting Planning

Faced with increasing pressure from ECPs, Vistakon had been active internally in late 1991 in considering how to deal with diversion, particularly through its distributors. This activity increased dramatically after the CLASS meeting, and the receipt of even further indications of possible group boycotts of Vistakon lenses unless Vistakon and optometry could "find a solution to the problem (of mail order) through joint action."²¹⁷

However, by January of 1992, Vistakon still hadn't decided upon any really new, much less final, course of action. The most senior executives of Vistakon knew that they would have to be ready to discuss some new diversion strategy by mid-month because the AOA was coming, at Vistakon's invitation, to visit Vistakon headquarters while in the area for the annual AOA Mid-Year Meeting. At the same time the optometric leaders were to be in Florida, Vistakon's management was also supposed to speak to the ophthalmologists at the CLAO Mid-Winter Meeting in Las Vegas and attend a CLI meeting there as well.

This was a critical time for Vistakon, for as Keefer wrote to Walsh:

Bernie:

I think we should discuss mail order dispensing of lenses. Is it

²¹⁶Keefer to Farkas, November 19, 1992. V 03823.

²¹⁷Wechsler to Management Board, December 4, 1991, concerning Sam Singleton, O.D., and a complaint re Lens Express and threat both to boycott Vistakon and discuss same with the South Carolina Optometric Association. The complaint was, according to Wechsler, "similar" to those "of CLASS, the organization of influential practice groups . . ." V 01611.

an industry problem? Is there illegal(no Rx) dispensing taking place?
We should split duty on CLAO/AOA Mid-Winter meeting
P.R. Keefer .²¹⁸

The AOA/Vistakon meeting was to occur during the 1992 AOA regular mid-year meeting scheduled to be held on January 14 and 15 on Amelia Island, Florida, near Jacksonville. The special agenda for the separate AOA/Vistakon meeting states that “issues relating to diversion of disposable lenses” were to be discussed,²¹⁹ specifically topics such as:

“Discussion of the concerns about patient retention. [Emphasis in original] This refers to the issues raised at the recent CLASS meeting that Phil Keefer reported to the Board. What help, suggestions, etc. can AOA give to help reduce the possible trend away from prescribing Acuvue/Surevue as a result of patients’[sic] buying lenses from outlets other than [sic] their own practitioner?” (Emphasis added)²²⁰

The AOA participants were informed of the date and time for the special January 1992 meeting, and were provided by their new administrative assistant, perhaps as an aide to their memories, with both the agenda for, and final report on the prior high level Vistakon/AOA meeting, the one in October of 1989.²²¹ Meanwhile defendant Dr. Yamane – still serving as Chair-Elect of the AOA/CLS Council while employed by Vistakon as Vistakon’s liaison to the AOA – attended a December meeting of the AOA/CLS where Dr. Giroux, the Administrative Director of CLS, reported that:

²¹⁸November 20, 1991 Memo V 03818-20.

²¹⁹Memo from Ingraham to Walsh et al. and AOA Executive Board dated January 9, 1992, Florida Consolidated Facts Tab 72 at A02052.

²²⁰Wechsler to Walsh, Yamane, et al. Re: AOA Mid-Year Meeting, Memo of December 9, 1991. J 7196, emphasis added.

²²¹Brackman to defendants Leadingham, Elliott, Gazaway, Hopping and others, December 17, 1991. Brackman Deposition Exhibit 1, 02055-60.

"There has been an increase during the past few months of calls to the CLS office complaining of mail-order lens-related problems, questions about release of a contact lens prescription, and other related calls."²²²

Dr. Yamane surely relayed this information to his new employer, as that was his job. He he took this dual role seriously, i.e., to relay information from and about ECPs to Vistakon and also to relay information from Vistakon to the AOA/CLS. An example is how he dealt with information from a California ECP complaining to Vistakon about mail order sales:

"I want to share this with our people here at Vistakon and in the AOA CLS."²²³

As an extra added pressure on the Vistakon executive staff, sales of Acuvue lenses were then falling as a share of both all soft lens new fits (i.e., the measure of absolute growth for the lens) and of disposable lens new fits, a drop of 6.9% in sales over the third quarter of 1991, and as a share of the entire disposable lens market during the last full year.²²⁴ Clearly, with sales down, Vistakon wanted to hear whatever the ECPs had to say.

"Demand"/"Supply" Diversion Strategies

On January 2, 1992, Craig Scott, Vistakon's Vice President for Marketing, wrote a memo to his boss, Phil Keefer, presenting a Vistakon "action plan" (promulgated apparently as a result of the November 11, 1989 Vistakon Board meeting, discussion supra) "regarding the emerging issue of patient retention," the term which Keefer had coined -- or borrowed from Dr. Farkas -- for

²²²Contact Lens Council Meeting Minutes, December 14, 1991. ATS 971107.

²²³Yamane letter to Dr. Spaeth, O.D., January 12, 1992. V 01817.

²²⁴Bain and Company produced Vistakon Market Share figures, BJ 4368-71.

the CLASS ECPs' concerns with losing replacement lens sales.²²⁵ The action plan set out two objectives and two strategies.

The "Objectives" were to help the ECPs retain their current Vistakon patients and to, in turn, "maintain eyecare professionals' positive attitude toward fitting new patients with Vistakon products." To attain these goals, Vistakon's new approach would be to fight alternative channels and diversion by adopting two strategies:

"To reduce the SUPPLY of diverted Vistakon products" [and second,]

"To reduce the DEMAND for diverted Vistakon products" (emphasis in original).

The "actions to manage the demand for diverted product" (emphasis in original) included several different steps, some which directly involved the AOA and obtaining AOA's approval. Id.

This new action plan to control demand confirmed that the size and nature of "patient retention/diversion problem" would be discussed with the AOA Board on January 15, that steps would be taken to "confirm legality of current mail order house dispensing procedures" and "if current mail order procedures are unlawful, Vistakon may choose to take a strong professional stance." Id.

Lastly, Vistakon would "determine what actions could be taken to disguise Rx [prescription] from patient," and discuss that option as well with the AOA Board so that before taking any action on its own, Vistakon could "obtain feedback from AOA Board on 1/15." Id.

²²⁵Scott to Keefer, Vist 0123158-60/ J7852-54, Keefer Deposition, February 22, 1999, Exhibit 21.

Defendant Dr. Hopping, then both an AOA board member and chairman of its Industry Relations Committee -- who had also been present at the 1989 AOA meetings with both Vistakon and B&L, and had been the AOA designee for preparing the Minutes on the agreements reached at those meetings -- took substantial handwritten notes at the January 15th Vistakon/AOA meeting. These notes reveal that each of these topics from Scott's January 2, 1992 memo to Keefer were indeed discussed, particularly including how the AOA and Vistakon could reduce diversion if they could "Reduce demand." Per Hopping's notes Vistakon also informed the AOA that it was spending \$300,000.00 on a "study of patient retention," a reference to the Bain & Company Study (discussion, infra) then underway at Vistakon, the results of which study could be used to address the problem with diversion.²²⁶

Bain & Company "Patient Retention" Study

The Bain & Company study which Vistakon executives discussed with the AOA had been commissioned in late 1991 to determine what "action steps" might be taken by Vistakon to address ECP concerns with patient retention in the face of competition the ECPs faced from alternative channels, particularly "mail order firms and pharmacies" which charged "20-50% below typical ECP charges." Id., at J 6919. Even though the final version of the Bain Study report²²⁷ would conclude that alternative channel distribution of lenses benefitted all parties involved, Vistakon nonetheless went on to adopt new sales, marketing and ECP training programs which were clearly not in its own best interest, as they focused "primarily on making...

²²⁶Hopping notes, Florida Consolidated Facts Tab 74; and Hopping Deposition at 157-161. See also Bain & Company "Vistakon Customer Retention Diagnostic," January 1992, J 6917-25.

²²⁷Bain & Company Report. Vist. 0164682-984, at Vist 0164962 and 0164964.

patient use of alternative channels more difficult.” Id.

This Bain & Company “patient retention” study became the basis for Vistakon’s next generation of ECP patient-retention training. These training programs on “Best Practices of Effective ECPs” were designed to assist ECPs to retain their patients and the related profit from sales of replacement lens in the face of alternative channel competition. These programs advocated a practice of limited prescription release -- and where legally possible, non-release of the prescription -- as being the most profitable practice for both the ECP and, as a result, for Vistakon.²²⁸ This training -- along with Vistakon’s related efforts at coordinating the distribution of AOA defendant generated prescription release forms, was conducted on a national basis in the ECP community from 1993 onward (discussion, infra).

Of particular note is the fact that very early on Vistakon provided the Bain consultants with not only the November 21, 1991 Preston Memo on the CLASS meeting, which called the attendees “nationally known” and “influential”-- but also provided Bain with the actual roster of CLASS attendees. This roster became the basis for a Vistakon analysis of the Acuvue lens purchases by these optometrists in 1990 and 1991, which revealed that the CLASS group had purchased over \$2,000,000.00 of Vistakon lenses in 1991 alone.²²⁹ These were major Vistakon accounts. Their concerns, and demands, were of great interest to Vistakon.

//

²²⁸ See BJ 3549, Bain & Company, questions re “What are the ‘best practices’ employed by the most effective ECPs?” and “Answers” which included that “Patient loyalty is a function of ECP customer retention practices: . . . not providing written prescriptions. . .”

²²⁹ BJ 1374-89. Dr. Yamane is, once again, specifically identified in this report as a CLASS member, given his membership in the Society of Contact Lens Specialists, a constituent group. See BJ 1388.

Missing "Minutes" of AOA/Vistakon Meeting

When asked to respond to discovery requests in this case, Tim Brackman, who in January 1992 was the then newly hired administrative assistant to the AOA's Industry Relations Committee, produced the "Discussion Topics"/Agenda prepared before the January 15th meeting, a document which included "diversion of disposable lenses" as an issue to be discussed by Vistakon and AOA. However, on that agenda Brackman hand wrote the following: "(No formal minutes were filed for this meeting)"²³⁰ While it is perhaps true that no such minutes were "filed" at the AOA, that doesn't mean that they weren't actually prepared.

When questioned on this, Brackman stated "I don't know why minutes were not produced or developed of this meeting," but at no time did he ever testify that they weren't actually taken.²³¹

The documentary record concerning that meeting produced since Brackman testified seems to indicate that actual "Minutes" of the January 15th meeting were both taken and prepared by the AOA. According to a February 7, 1992 letter from Hopping to Walsh, apparently Hopping and Brackman were then "in the process of putting some minutes together" which were to be sent to "Phil" Keefer "for his review and clearance," the same exchange and approval process as had been followed in October of 1989. When asked by Plaintiff States' counsel about the location of these minutes, Hopping said "I don't know. . . You may have them." Thus it

²³⁰"Discussion Topics" AOA produced document 02049, emphasis added.

²³¹Brackman Deposition page 50, ll. 7-9.

seems that the minutes were taken, were prepared, but have not been produced.²³²

“Fitter on the Premises”: A New Policy

The discovery record also reveals that Vistakon’s new “fitter on the premises” sales restriction announced first to its distributors in late January and then to the public in March, did not come into existence until after the AOA meeting on January 15, 1992. Vistakon met with AOA, and only then did it adopt this new restriction upon the distribution of its lenses.

This fact can be readily discerned from the January 14, 1992 notes of Phil Keefer to his staff, who were planning for the annual TPC Weekend meeting to be held in Jacksonville later that Spring. This meeting was an annual Vistakon affair to which Vistakon would invite a select group of ECPs. These ECPs, whom Vistakon viewed as “our most productive ‘Prophets,’” first attended a morning session designed to obtain participant ideas on “what it will take to get ECPs to fit more. . . Acuvue and Surevue lenses,”²³³ and then spent the remainder of the day at the P.G.A. TPC Golf Tournament.

This was therefore a major event and as such his staff sought Keefer’s “feedback” on their proposal for Vistakon’s presentation topics. Their idea was for a Vistakon executive to address the group on “Our commitment to ECP,” and under that topic heading they proposed to include “Patient Retention” and “Diversion,” as areas of initiative demonstrating Vistakon’s “Partnering/Partnership” with the ECPs. Id.

Keefer had a strong reaction to these “Patient Retention” and “Diversion” topic proposals,

²³²Hopping Deposition, November 10, 1998, pp. 297-310, at 303. See also Hopping Deposition Exhibit 42, HOP 970007-8.

²³³See J 4464 Staff Memo to Keefer re: “1992 TPC.”

to wit:

“I wouldn’t discuss problems like (these) unless we have action to announce.” Id.

When that meeting later did occur, Keefer himself told the assembled ECP “prophets” that Vistakon had:

“Listened to Eyecare Professionals [and had] Revised [the] Customer Policy, [to produce] Better Patient Control.”²³⁴

Thus it is clear that even up to the day before the meeting with AOA, Vistakon had not decided to impose the “fitter on the premises” restriction on sales.

Further evidence of the fact that this new policy was not adopted in the normal course of business, but rather as the result of the AOA defendants’ pressures at the January 15th meeting, is demonstrated by the curious absence of Vistakon Management Board minutes for the precise time period when the policy – had it been adopted as a normal, independent business decision – would have been discussed and enacted.

Plaintiff States in discovery sought to determine whether there was any evidence that this new policy was independently adopted by Vistakon. As such Plaintiff States asked for production of the Management Board Meeting Minutes for January 27, February 10th, 17th, and 24th, as well as for the minutes of what was termed as the “Strategic Committee Meeting” of January 20, 1992. This would have been the time period when any determination by Vistakon would have been made concerning this new “fitter on the premises” policy. What we obtained was only one document – which did not mention the policy – and nothing more. When a motion

²³⁴Keefer to Schildhouse, January 14, 1992. J 5332-35. See also Copy of Keefer TPC Presentation slides, V03726, V 03729.

was made to compel production of all these other minutes, the answer was that they were missing. Even Vistakon's counsel had a problem explaining this fact, and he told Magistrate Judge Snyder that:

"I'm going to be candid with you, I was quite surprised when they weren't there."²³⁵

The jury may draw a conclusion from this mysterious development that perhaps the minutes are missing for a reason. Perhaps they no longer exist because they disclosed the conspiratorial agreements reached during the meeting of January 15th, just as did the records of the October 1989 AOA/Vistakon meeting which detailed the agreements reached at that earlier time. This is an issue for the jury to weigh and consider.

c. The AOA-B&L Meeting

By late 1991- early 1992, all three of the disposable lens manufacturers knew that the threat of a boycott by ECPs was hanging over any manufacturer who decided to ignore the ECPs' pressures not to sell their lenses to alternative channels. CIBA Vision, which along with B&L had obviously read the trade press on this question, such as Dr. Rigel's none too subtle statements discussed above, figured out that while entering the pharmacy channel might have many "Pros," the first and largest "Con" was that "Manufacturers participating or developing retail trade may be boycotted by professional trade," with the result being " [p]rivate practitioners stop dispensing CIBA brands and return inventories"²³⁶

²³⁵Comments of Richard Ripley, Esq., Counsel for Vistakon, Transcript of Hearing of February 4, 1999, at page 179, ll. 10-12. Docket # 660.

²³⁶See CIBA Vision "Pro's" and "Con's" CV09038.

B&L had even greater reason to worry, having heard directly from CLASS that the ECPs were ready to launch such a boycott if B&L didn't change its ways, and they knew from the AOA/CLS that the ECPs whom they most depended upon to sell their lenses believed that mail order sales were the "burning issue" affecting optometry.²³⁷

Against this background, on February 28, 1992, little more than a month after the AOA-Vistakon meeting at Amelia Island, a meeting occurred at the Marriott Hotel in Atlanta, Georgia. In attendance were the leadership of the AOA (including the president, Dr. Elliott, the president-elect, Dr. Leadingham, the vice president, Dr. Daniel Houghton, the immediate past president, Dr. John Gazaway, and the Industry Relations Committee chair, Dr. Hopping) and B&L executives, including Harold Johnson, the President of B&L's contact lens division.²³⁸ Notes of the meeting as well as the agenda indicate that Melvin Wolfberg, O.D., B&L's Vice President of Professional Relations, was present and participated in the meeting.²³⁹

The diversion of contact lenses was discussed there.²⁴⁰ At the conclusion of the meeting, members of the AOA staff wrote to Harold Johnson thanking B&L for its hospitality. Dr. Hopping's letter to Hal Johnson dated March 9, 1992 reads:

Many things you mentioned seemed to be needed and on target.

²³⁷Solomon letter to Art Giroux, January 6, 1992, referencing a "meeting this week" with Hal Johnson of B&L. AOA 00859.

²³⁸Letter from Brackman to Wolfberg dated February 12, 1992, Florida Consolidated Facts Tab 75 at 02082-83.

²³⁹Notes of Timothy Brackman, Florida Consolidated Facts Tab 75. In his deposition, Dr. Wolfberg does not recall whether he attended or not. Wolfberg Deposition at 23; Florida Consolidated Facts Tab 75 at 02082-83.

²⁴⁰Johnson Deposition at 201-202.

Each group should probably reflect upon the discussion then review the materials to ascertain what can and should be done. I'm sure that Mel [Wolfberg] will be following up.²⁴¹

2. **The Defendant Manufacturers' Post-Meeting Steps
Against Alternative Channels**

Vistakon's "Fitter on the Premises" Policy Goes Into Effect

By February 12, 1992, less than three weeks after the AOA-Vistakon meeting, Vistakon had its new customer policy set, one which would require any authorized dispenser of Vistakon's Acuvue and Surevue lenses to have a "fitter on the premises."²⁴² By March 11, 1992, the new policy was announced in a press release.²⁴³ As clearly revealed in its annual report to J&J Headquarters, this change came about because of the threats by the ECPs to stop selling Vistakon lenses:

"2. Problems

* * * * *

²⁴¹Florida Consolidated Facts Tab 76. It was at about this time that the AOA considered whether to perform another "survey" such as that of 1989 to determine if optometrists' patients had in fact suffered health problems attributable to their lenses being obtained from alternative sources. Dr. Giroux's notes reveal that the AOA had reservations about what such a survey might reveal:

6. Survey - Group suggests no survey re: "bad incidents" because (1) we may not get the data we want & (2) If we don't publicize the results (which we would have to do), it would hurt us. OK to ask questions re: incidences of filling Rx w/ expired presc. dates etc. Don't, however, stress what harm if any occurred.

Handwritten notes of Giroux, Florida Consolidated Facts Tab 77; Giroux Deposition at 305-306. It also must be remembered that for the results of the initial survey in 1989 to be useful, they had to be and were distorted and misrepresented by the AOA to both the press and FDA.

²⁴²Memo from Harkleroad to Greenaway dated February 12, 1992, Florida Consolidated Facts Tab 78.

²⁴³Florida Consolidated Facts Tab 79.

Diversion

. . . . Our products in the U.S. are being diverted to unauthorized channels of distribution(mail-order houses and drugstores). This is causing a major negative reaction from our customers, the doctors, many of whom are considering not fitting disposables. We are tightening our control of the product and will become more aggressive enforcing our [sales] policy.” (Emphasis added.)²⁴⁴

After the Amelia Island meeting, Vistakon began to step up its enforcement against diverters. Customers like Lens Express and Contact Lens Supply had been obtaining grey market lenses from “back door” suppliers, including Vistakon authorized distributors. The distributors were told by Vistakon -- by phone, in person and by written instructions -- that they were either to cease selling to any account unless it was “licensed to fit and dispense contacts on the premises. . .”(emphasis in original) or face “the termination of our business relationship.”²⁴⁵ Vistakon then took steps to cut off the supply of lenses to Lens Express,²⁴⁶ Lens Direct,²⁴⁷

²⁴⁴Vistakon Worldwide Franchise Report for 1991 J 3020-21, emphasis added.

²⁴⁵Letter from Steve Wilson, Distribution Sales Manager, to Angel Alvarez, Alvaco Ophthalmics -- who Vistakon knew had been selling lenses to Lens Express -- dated February 17, 1992. V01356-57.

²⁴⁶Letter from Wilson to Alvarez dated February 21, 1992, Florida Consolidated Facts Tab 80.

²⁴⁷Letter from Harkelroad to Wilfand dated February 17, 1992, Florida Consolidated Facts Tab 81.

Professional Contacts on Call,²⁴⁸ Contact Lens Supply,²⁴⁹ Imperial Optical,²⁵⁰ Wal-Mart,²⁵¹ Eckerd Drug Company²⁵² and King Soopers.,²⁵³ among others.

This was a real change for Vistakon. In the past whenever anti-mail order, anti-drugstore, and for that matter, anti-mass merchandiser, actions had been taken, they had been spotty and erratic. This was well known to the distributors who feared that any accounts they that were forced to cut off for selling lenses to alternative channels would be and were being picked up as new business by their competitors, including other Vistakon Authorized distributors. This time Vistakon told them it would be different. Vistakon told them all distributors faced termination if they failed to abide by this new policy.²⁵⁴

The aggressive enforcement of the new sales policy had a profound effect on both the

²⁴⁸Letter from Harkelroad to Wilfand dated February 18, 1992, Florida Consolidated Facts Tab 82.

²⁴⁹Letter from Harkelroad to Natkin dated March 15, 1992, Florida Consolidated Facts Tab 83.

²⁵⁰Letter from Preston to Gad dated April 8, 1992, Florida Consolidated Facts Tab 84.

²⁵¹Letter from Meyer to Harkelroad dated March 26, 1992, Florida Consolidated Facts Tab 85.

²⁵²Letter from Lelekis to Harkelroad dated March 23, 1992, Florida Consolidated Facts Tab 86.

²⁵³Letter from Kobach to Harkelroad dated March 23, 1992, Florida Consolidated Facts Tab 87.

²⁵⁴Harman to Harkleroad Memo, February 15, 1992, re: "feedback" from Wise (a Vistakon authorized distributor) on new sales policy enforcement. V 01438-39.

wholesale²⁵⁵ and the retail lens markets.²⁵⁶ Mail order houses and pharmacy suppliers were unable to get lenses.²⁵⁷ Vistakon promulgated a "do not sell" list to distributors consisting of the names of suspected diverters or alternative distributors.²⁵⁸ Entities on the "do not sell list" were sometimes granted a limited one-time last purchase of lenses before they were entirely cut off.²⁵⁹

B&L Follows Suit with its New "Fitter on the Premises" Policy

On March 25, 1992, two weeks after receiving the letter from AOA's Dr. Hopping and only twenty-seven days after the Atlanta meeting with the AOA, B&L's Dr. Wolfberg announced B&L's new sales policy in a letter to the trade as follows:

Bausch & Lomb's Lens Distribution Policy is to provide contact lenses solely to licensed eye care professionals for dispensing to their patients. Bausch & Lomb provides these lenses either directly or through its authorized distributor network.

²⁵⁵Harkleroad to Keefer, Memo of April 6, 1992 re "effect of our new policy on distributors," sales down by over 50% since new policy went into effect. J 5023-24

²⁵⁶Vistakon's contention that the process of increasing the enforcement of its sales policy commenced in October of 1991 (prior to the November 8, 1991 CLASS meeting) is not borne out by the evidence. The memos written by Vistakon's sales staff in October 1991 concerning the need for increased enforcement were not brought to management's attention until November 11, 1991, the same day that Mr. Keefer brought to Vistakon's management board CLASS's concerns about the low retail price of Vistakon lenses available through alternative suppliers. Memo from Ward to Preston dated November 11, 1991, Florida Consolidated Facts Tab 88.

²⁵⁷Edelson Deposition at 171-72; Ginis CID Statement at 26-27; D. Hundt Deposition at 856-57; Florida Consolidated Facts Tab 89.

²⁵⁸Many of the names of businesses on the "do not sell" lists were familiar. Norm Ginis and Contact Lens Supply were on some of the lists, as were Lens Express and Professional Contacts on Call. While these entities had been cut off after the 1989 meetings as direct accounts, they had been obtaining their lenses on the grey market through B&L and Vistakon authorized distributors. The AOA defendants found this turn of events unacceptable.

²⁵⁹See, e.g., Florida Consolidated Facts Tab 82 at V00641.

An eye care professional, authorized distributor or retail optical chain selling lens products, directly or indirectly, to grocery stores, drug stores, pharmacies, mass merchandisers, or other similar businesses without a licensed eye care professional fitting the lens products will be considered to be making an unauthorized sale of lens products. Should this occur, Bausch & Lomb reserves the right to discontinue any relationship in the sale of lens products.²⁶⁰

This new policy was, for all practical purposes, identical to Vistakon's "fitter-on-the-premises" policy announced two weeks earlier. As in Vistakon's case, B&L's actions against diverters again increased.²⁶¹

It is not surprising that Vistakon and B&L capitulated to and joined with the AOA, given the power of the ECPs, power as a matter of record (discussion, supra) and as an economic fact, discussed in great detail by both Dr. Hall on behalf of Florida and Dr. Greer on behalf of the Plaintiff States, in their respective reports.²⁶²

²⁶⁰Florida Consolidated Facts Tab 8. This "fitter" limitation was later amended by Hal Johnson to strike "fitter" and replace with "dispensing" once B&L realized that their new policy would have forbidden them to sell to opticians, a major portion of their business. See B&L 106. Vistakon left "fitter" alone in their policy, and yet still sold lenses to opticians, who cannot "fit" lenses in most states. Webb Deposition, July 13, 1995, page 108, ll. 4-6.

²⁶¹Express Vision was cut off, Memo from Richardson to Preston dated March 23, 1992, Florida Consolidated Facts Tab 29, as was CLS, Letter from Daniel to Ginis dated May 18, 1992, Florida Consolidated Facts Tab 33, and Vision Express, Letter from Webb to Vision Express, Florida Consolidated Facts Tab 35. That this was a new policy was clear from B&L's previous practice of not only selling to known alternative channels, but also to accounts which only had "arrangements with an O.D. nearby to do refractions and fittings, [but] no exams are done on the premises." B&L memo, July 10, 1991, re Vision Express, dba Optical Express in Manhattan. B&L 48640-42.

²⁶²Robert Hall, Florida's expert, has a discussion regarding the power of the AOA in his analysis and speaks of "threat points" which, in economic terms, are points in negotiations where obvious threats are perceived by the negotiators without necessarily explicitly saying what the threats are. Hall Deposition at 427-429; 470-484.

H. The “Demand Side”/Prescription Conspiracy

As discussed above, the ECP defendants knew from very early on that the mail order/pharmacy threat to their economic well being could be defeated only if they could both restrict the supply of lenses available to the alternative channels -- something that could only be done by enlisting the manufacturers in their efforts -- and control the demand of consumers for lenses at the alternative channels. This latter effort and approach could have been almost completely successful -- and lawfully so -- if the ECPs had been willing to change their old ways of doing business with their patients. Most were not.

Examples of how this might have been accomplished legally include the ECPs reducing the prices charged for all lenses so as to be truly competitive with the alternative channels for replacement lens sales while making their profits off of their professional service fees as other medical professionals normally do. The record reveals that most independent ECPs did not readily adopt this approach, rather they wanted to have their cake and eat it too by charging high prices for lenses, both original and replacements, and in many instances even adding on fees for merely dispensing replacement lenses.

The only way this ECP approach of charging high prices for replacement lenses could continue to work in the face of increasing competition from alternative channel sales was for the ECP to somehow lock in the consumer to the ECP's practice so that effectively she couldn't go elsewhere to purchase her replacement lenses. Furthermore, this scheme could only be successful over time if the restraint upon the consumer's choice was both effective and pervasive. Continued success of this high profit scheme thus required that the independent ECP community at large be educated -- in their own self interest as well as that of their fellow ECPs --

to join in this effort. ECPs who were most active in pushing the use of such demand restraint techniques appeared to include those who feared they might lose their patients as well as their replacement lens sales, not only to alternative channels but also to other ECPs, unless those fellow ECPs also joined in and imposed prescription/demand side restraints.

While the record is clear that the ECP/AOA defendants had worked on imposing restrictions upon prescriptions and prescription usage for years, it became equally clear that any really effective program would need the assistance of the manufacturers to reach far and wide into the ECP community. The manufacturer defendants -- with their vast networks of sales reps and large marketing budgets -- were well situated to spread the gospel of a demand side conspiracy, and they did so.

It is clear from the record that this campaign came at a cost to the manufacturers who understood that their ultimate customers, contact lens wearers, preferred to purchase their replacement lens from someone other than their ECPs:

... [E]xorbitant product markups on the part of ECPs and the inconvenience of returning to the ECP's office to pick up product have driven patients to purchase product through alternate channels of distribution.

* * *

The success of mail order houses and drug stores in selling contact lenses indicates that consumer demand for a convenient and cost effective means of purchasing lenses is increasing.²⁶³

²⁶³Vistakon memo dated July 27, 1992 from David Applegate regarding distribution of "MAXIMIZE," Vistakon's code name for what became "1-Day Acuvue," Vist 0004608-618, at Vist 0004612-13. Dr. Hall concluded that "[t]he margins charged by ECPs on replacement lenses are extraordinary by retailing standards." See Hall Liability Report at 34-35, Florida Consolidated Facts Tab 47.

Although they knew that their individual self interest lay with opening up rather than further restraining the flow of their products to consumers, the manufacturers had no choice by this point but to go along with this "Demand" half of the Demand/Supply conspiracy.

As a result of the defendants' supply side activity alternative channels were soon either unable to obtain²⁶⁴ -- or obtain only at increased cost and difficulty -- replacement contact lenses. This, of course, did raise the retail price of such lenses to consumers by substantially reducing price competition. Vistakon's own internal documents confirm that mail order retail prices increased.²⁶⁵ The effect was clearly "substantial" and has now been quantified by Dr. Greer and Dr. Hall in their Damages Reports²⁶⁶

The manufacturers, both Vistakon, which by Fall 1991 had Dr. Yamane on staff, and B&L, which soon thereafter added defendant Dr. Solomon to its staff, were certainly aware and well informed by early 1992, at the very latest, of the ongoing efforts of the AOA (discussion, supra) to encourage consumer demand restraint via having ECPs adopt the practices of either total refusal of patient and third-party prescription release requests or utilization of prescription content/restriction policies and related office and prescription practices, particularly in the ever increasing number of states -- 13 by May of 1992 and 16 by June of the same year ²⁶⁷-- which

²⁶⁴See Walsh to Dr. Hillier, Letter of May 4, 1992 re effect of new "customer policy": "[y]ou will be pleased to know that several of the larger mail-order houses are already out of product." V00416.

²⁶⁵Florida Consolidated Facts Tab 63.

²⁶⁶Hall Damages Report, Docket # 714; Greer Damages Report, Docket # 704.

²⁶⁷See Harris, "How and When to Release Contact Lens Prescriptions", Review of Optometry, May 1992, pp. 47-50, W 00109-111. See also AOA document produced by the Wisconsin Optometric Association, of June, 16, 1992. W 00156. 13 of those states are Plaintiffs

required prescription release.

The manufacturers had adopted their new "fitter on the premises" restrictions for the simple reason that they were afraid not to. When Vistakon's Consumer Products Director was asked why Vistakon had "adjusted" its sales policy in this fashion, Mr. Koberna stated:

"We couldn't sell our products, and doctors were saying to our sales reps, 'I am losing patients; therefore I don't want to put anymore new patients into Acuvue because they will walk out of my door.'" ²⁶⁸

Despite the now incessant repetition of the claim that the "fitter on the premises" restriction was imposed out of a concern for the ocular health of consumers, a review of contemporaneous documents from Spring of 1992 revealed that Phil Keefer ("PRK") told his staff, in doing strategic planning for the upcoming year, that:

"Diversion" [is a] "Business Issue = ECPs will fit less or no Acuvue if they lose patients." ²⁶⁹

Thus, defendant manufacturers also knew that the ECPs' economic concerns with diversion didn't cease with the adoption of the manufacturers' "fitter" policies. In fact when the Society of Contact Lens Specialists, a part of the CLASS assembly and Dr. Yamane's old practice management group, came to call on Vistakon in early April of 1992 -- with defendants Remba and Snyder at the forefront -- the very first topic on the agenda was "Diversion of

here.

²⁶⁸Koberna Deposition, March 15, 1995, page 45, ll. 21-24. In fact, Vistakon was so afraid of the power of the AOA that when it decided to launch its own version of what it hoped would be an acceptable 'mail-order' style operation -- the "Doctor Controlled Patient Delivery" system -- Yamane asked for the AOA's legal counsel and the AOA/CLS to approve of same before going forward. A 001545-47.

²⁶⁹Vistakon "Strategic Planning Agenda, May 20-21, 1992" J 6226-7.

Vistakon Products,” just as it was for an April 10, 1992 meeting in Jacksonville between Vistakon and the Officers of AOA/CLS, including defendant Dr. Solomon.²⁷⁰

Throughout that same Spring, Vistakon talked to and heard from other groups of ECPs about the possibility of “disguising patient prescriptions” on the packaging, a subject discussed with the AOA leadership on January 15th, and efforts along those lines continued for many months thereafter.²⁷¹ The diversion/patient retention issue was still alive.

The efforts of the AOA defendants to attack this problem didn’t slack off in 1993 either, as evidenced by a nationwide distribution to the president of every state optometric association of a complete set of alternative scripts prepared for ECP office staff use in dealing with prescription release requests. This March 1993 document consisted of a set of materials which had been discussed at the January 1993 AOA Presidents’ Council Meeting and had earlier been sent to every optometrist in the State of Pennsylvania. While it was carefully worded -- “We are not developing a ‘POA Position’” -- its actual intent and purpose to spread the word on prescription release request denial or deflection is obvious from its content.²⁷²

As discussed above, this refusing to release prescriptions as an AOA defendants’ endorsed ECP strategy to “fix the problem” of alternative channels -- one which was again suggested to the manufacturers as an anti-diverter tactic by AOA/CLS, CLASS and Advisory

²⁷⁰Vistakon Agenda/Briefing Package by Stan Yamane, J 6820-31; Vistakon April 9, 1992 Memo re AOA/CLS Meeting set for April 10, 1992. J 6832, J6840.

²⁷¹Scott to Harkleroad, April 2, 1992; V04342. See also Rogaski Deposition, passim.

²⁷²See this Wisconsin Optometric Association produced, POA generated, paper of March 5, 1993 E 00023-27.

Panel ECP leaders in early 1992²⁷³ -- was an approach that already existed in the marketplace in late 1991, early 1992 when the Bain & Company study first identified it as an ECP "best practice" to retain patients.²⁷⁴ The AOA defendants had already achieved some measure of success with their scheme, they wanted more.

Given all of the above, what happened next was that both Vistakon and B&L decided they had to meet the ongoing wave of ECP demands for even greater manufacturer assistance in the battle against diversion and alternative channels. The manufacturer defendants met the demands by joining in with the ECPs and developing programs to increase patient retention.

While this goal might have been met by individual manufacturer and ECP actions -- and surely could have been done in a legal, non-conspiratorial fashion -- State Plaintiffs allege that it was in fact accomplished by the jointly agreed upon adoption of several different sales and marketing programs, ones run by Vistakon and by B&L designed to reach ECPs at large with an agreed upon restraint of trade message exhorting every ECP to adopt the "best practice" of either not releasing, resisting release or diminishing the utility of released prescriptions to their patients.

²⁷³See Barry Farkas of CLASS, AOA/CLS, Vistakon Advisory Panel, fax of April 24, 1992 to Drs. Wechsler and Yamane at Vistakon, enclosing the B&L DACL Press Release and Dr. Wolfberg's/B&L "fitter on the premises" letter of March 25, 1992, with the handwritten suggestion "Stan [Yamane] - Wouldn't it be nice if Vistakon could find a way to stretch their Diverter statement to advise practitioners not to give Rx's to mail order houses? It would be a coup . . ." J 8046-48.

²⁷⁴See BJ 1950. See also Vist 0164766, which indicates that in 1992 approximately 50% of Bain identified "High Performing" ECPs refused to ever release prescriptions as one way of dealing with loss of sales to competitors and about 48% would give out the prescription, but only on request, while only 2% always volunteered the prescription to their patients. "High Performing" was what Vistakon wanted, if it wasn't going to follow Bain's primary suggestion and openly enter the alternative channels market. Discussion, infra.

This conclusion is buttressed by the record which reveals that Vistakon certainly acted in other than its individual self interest when it undertook these training programs.

The 1992 Bain Study had found once again -- as had McKinsey & Company back in 1985 -- that if Vistakon was to grow its sales as rapidly as they could be grown, it would involve adding "pharmacies and/or mail order firms as authorized channels" for the sales of its lenses²⁷⁵ But Bain, knowing as McKinsey & Co. had come to know that this departure from the wishes of the ECPs was likely to result in serious ECP anger, and further realizing that such a step -- even though one in Vistakon's own best self-interest -- would be difficult, then made a alternative, mixed market proposal that just might allow Vistakon to enjoy the best of both worlds.

Bain carefully suggested that Vistakon engage in "tactics to gain ECP support [for this entry into the alternative channels market], such as flat payments to ECP on refill [of a patient's lens prescription by an alternative channel] etc." Id. When it became clear that Vistakon wouldn't take such innovative steps -- again ones which would be in Vistakon's own best self interest -- then Bain fell back on a suggestion that the next best step was to "increase acquisition cost of lenses for alternative channels." Id. This least self-promotional of the three marketing alternatives was the route which Vistakon followed, and part of pursuing that route involved making the "best practices" recommendation a reality.

The HSM Group Programs

In 1993 Vistakon undertook a development project with the HSM Group that led to a

²⁷⁵Bain Report at Vist 0164965, at fn.227, supra. This fact was also known to Vistakon's Sales management in analyzing "Alternate Sources" in 1992: "Our current relationships with key customers (chains, distributors) are strained. Their desire, in general, is to supply product to mail order." J 3024-26, at 3024.

Vistakon run instructional program for ECPs. This instructional package of lectures, face to face training, videos and hand-outs taught ECPs how both to prevent patients from ever even making a request for their prescription in the first place and then, if that failed, how to deal with, and hopefully derail, insistent consumer requests for their prescriptions. The clear purpose of all of this was to help the ECP to never release the prescription, whenever possible, or failing that, to at least keep the consumer from using the prescription to purchase lenses elsewhere.²⁷⁶

The HSM program -- including a nationally circulated brochure entitled "Managing Prescription Requests for Patient Satisfaction and Retention"²⁷⁷ -- suggested to the ECP that if the consumer insists on the release of the prescription, the ECP should require the patient to come to the office to pick it up personally and once there to take the opportunity to try yet again to discourage the release. If the patient insists on having the prescription mailed, HSM suggested that a sheet be sent along with the prescription comparing the price and convenience of lenses from the ECP and alternative channels. *Id.* The purpose and intent of the sheet was to keep the patient from buying the replacement lens from any source other than the ECP. *Id.*

Vistakon, through the HSM programs, also distributed a prescription release form to ECPs for their use that, among other things, included language designed to shift responsibility for patient health to the ultimate provider of the lens, something which the well-circulated Snyder/Solomon/Klein form (discussion, supra) had tried as well.²⁷⁸ This and other language in

²⁷⁶Deposition of Anne-Marie Nelson, January 28, 1999, at pp.17, 88, 101,107-09, 108-110.

²⁷⁷See Wisconsin Optometric Association produced copy, W 00231-244.

²⁷⁸See Vist 0165657

the HSM form was meant to advise patients, none too subtly, of the purported but undocumented dangers of buying their lenses elsewhere from than their ECP, and was suggested as part of a program that was intended to give the ECP shot after shot at retaining the patient's replacement lens purchases.

Such programs clearly were designed to place several barriers between a patient's request for her prescription and the ECP's finally turning it over. As such, the HSM program suggested that ECPs engage in a charade, i.e., publicly espousing that an ECP "just say yes" to prescription requests, but then teaching the same ECP to do everything possible to make certain that this release never occurs.

Clearly, such a set of detailed instructions in what amounted to overt stage craft both recognized that the question of prescription release was a "hot issue" with ECPs,²⁷⁹ and allowed Vistakon to show their support for the ECPs in dealing with same.²⁸⁰

Other Vistakon Prescription Release Related Activity

Also during this period, the AOA and Vistakon were working on what they -- in their joint interest in fighting alternative channel sales -- thought should be included in a "Model" contact lens prescription, an interesting project for the manufacturer of a medical device for which even the FDA felt no need to establish federal prescription standards. Dr. Giroux of the AOA/CLS sent Vistakon's Dr. Yamane a "Contact Lens Release Form (Draft)" in October 1992. This draft was the model for AOA discussions then held in Washington, D.C. in November 1992 on "the broad subject of a contact lens prescription, its release, and the dispensing of

²⁷⁹See Vist 0165536.

²⁸⁰Anne Marie Nelson Deposition, supra, at 129.

contact lenses by alternate delivery systems," i.e., alternative channels.²⁸¹

Perhaps the most interesting element of this "Contact Lens Release Form" which the AOA was promoting as a "Model" are the extraordinarily short expiration dates which the form suggests for patient prescriptions for daily wear lenses -- six months since the patient's last ECP visit -- and for those fit in extended wear lenses -- three months since the last exam. As mentioned above, this is far more restrictive than the most restrictive exam interval recommendations ever made to that date, or since, by the AOA. The form also seeks to limit the number of refills -- one pair of conventional lenses and a three months supply of disposables -- which the patient can obtain with a prescription before having to return to the ECP's office for a "Progress Examination." This would not necessarily be a regular eye exam, but rather an added exam with, of course, an extra ECP service charge. *Id.* All of these requirements would, of course, significantly detract from the utility of the prescription, assuming the consumer could even get the prescription from an ECP who would adopt this form.

Vistakon was enamored of this approach even before it was developed into the more polished HSM form. Discussion, supra. Beginning in 1993, Vistakon provided its national sales force with a special handout for their ECP customers, one which included the straightforward advice -- without reference to any legal, regulatory or medically set standard -- that when a patient requested their prescription, they were to be refused if the consumer hadn't had an eye exam within the last six months.²⁸²

²⁸¹Giroux to Yamane, October 20, 1992. Vist 0148662-68. Despite discovery requests, no minutes have been produced from this November 1992 meeting.

²⁸²Preston to Kelly, Wheatley and Yadon, Memo "Releasing Contact Lens Prescriptions." January 15, 1993. J 12886-90.

B&L "Dream Team"/B&L University

When B&L met with the AOA in February 1992, B&L informed the ECPs that it would be launching a new concept in practice management training -- the "B&L Dream Team" -- and apparently asked the AOA's leadership to participate in the program, which defendant AOA President Elliott promised to "fully discuss" and get back to B&L.²⁸³ At pages 81-83 of his Liability Report on behalf of the Plaintiff States, Dr. Greer describes and discusses this program as well as the "B&L University" effort, both of which programs B&L launched in an effort to teach ECPs how to best fight off alternative channel competitors, once again including dealing with and deflecting prescription release requests by consumers. As Greer notes, Defendant Dr. Elliott, then President of the AOA, had the honor of having his office selected as one of the very first offices the "Dream Team" would visit.

As also noted in Dr. Greer's report the primary "health" concern which B&L's training programs was designed to address was the "health" of the ECP's pocketbook in the face of competition from alternative channels. In addition to the "Dream Team" and "B&L University," B&L also promoted various "Patient Loyalty" programs which the ECP could utilize to increase patient retention, and thus retain profits from replacement lens sales.²⁸⁴ In fact, by July 15, 1992, B&L went further down this particular road on how to help their co-conspirator ECPs defeat the alternative channels than even Vistakon had publicly gone before.

On July 15th B&L issued a press release announcing the text of a new package advisory insert directed to consumers, one to be placed in the boxes of all of its disposable/frequent

²⁸³Elliott to Johnson, March 4, 1992. B&L document production, 00032026.

²⁸⁴Greer Liability Report, Docket # 655, at p. 83.

planned replacement lenses. Interestingly this new advice was limited to only these lenses and was not to be included with B&L's traditional lathed soft lenses.

This advice to consumers was designed to "encourage lens wearers to see their eye care practitioner on a regular basis," but not just for eye examinations and eye care needs. Rather it told the consumer the following, that:

"To safeguard your eye health, Bausch & Lomb recommends that you purchase your contact lenses only from your eye care practitioner and that you see your eye care practitioner regularly for checkups."(Emphasis added)²⁸⁵

This piece of medically couched but medically unwarranted advice was an ECP's best possible patient retention marketing tool. In the utter absence of any actual medical, scientific evidence of any increased ocular health risks associated with a patient obtaining her replacement contact lenses through an alternative channel, B&L, acting with and for its ECP partners, created the appearance of such a danger in the mind of any consumer who read this insert.

Lastly, B&L was actively involved in assisting state optometric associations in their economic, rather than health care based, efforts to change their state laws and regulations regarding "prescribing and dispensing of contact lenses."²⁸⁶

I. Conspiracies' Substantial Impact on Consumers in the Plaintiff States

Economic expert testimony by Drs. Douglas Greer and Robert Hall reveals that without any doubt the alleged conspiracies affected retail prices, thus impacting consumers in each and every one of the Plaintiff States. The details of those analyses are found not only in the Hall and

²⁸⁵Press Release, July 15, 1992, BLF 000001; Package Insert, 00132.

²⁸⁶Greer Liability Report, Docket # 655, at page 83

Greer reports on Damages and Liability²⁸⁷ but also in their testimony on both sets of reports.

Damages estimates for the citizenry of the 32 states involved clearly ranges into the hundreds of millions of dollars in single damages for sales by just Vistakon and Bausch & Lomb during the relevant time periods for which each expert has developed a damages model/estimate.

It must be remembered that Plaintiff States and Florida both share the same theory of the case, i.e., the overall retail price of all multi-packs of disposable/frequent replacement contact lenses, regardless of the seller, has been affected by the conspiracy. While B&L lenses may have been more available to alternative suppliers than Vistakon lenses during certain time periods, available evidence reveals that the inability, or severely reduced ability, of alternative channels, both mail order and pharmacies, to obtain the quantity of lenses they wished to sell directly from the manufacturer. This restriction in turn affected their ability to purchase lenses at competitive prices because they had to pay more for lenses from gray market sources and likewise spend great blocks of added time locating them, all the while losing any promotional as well as normal commercial trade and credit benefits of dealing directly with a manufacturer. This restraint had an impact on the retail consumer of disposable contact lenses.²⁸⁸

Even defendants' experts acknowledge some impact on consumers. The AOA's expert, Dr. Gary French, conceded that the damages could amount to as much as almost a dollar a box.²⁸⁹ Vistakon's original liability expert, Janusz Ordover – upon whom their current liability expert, Dr. Almarin Phillips, and their Damages Expert, Dr. David Teece, both rely -- reached a similar

²⁸⁷Hall Damages Report, Docket # 714; Greer Damages Report, Docket # 704.

²⁸⁸Hall Report at 32-33; Greer Liability Report at 123-127.

²⁸⁹French Deposition, at 298.

conclusion:

I said, repeatedly -- I'm going to repeat myself again -- that I can visualize or I can understand that in some geographic areas, the effect of the removal of the restraint may have a downward effect on price.²⁹⁰

Consequently, it is obvious that the impact element has been satisfied, even by the admissions of Defendants' own experts.²⁹¹

The record is now clearer -- as concluded by Vistakon's consulting experts, McKinsey & Company in a 1997 study, one provided to Plaintiff States only within the last two months -- that unrestrained operation of the alternative channels of distribution would have had several positive effects. Such would have lowered the cost of replacement contact lenses in the marketplace²⁹² and thus increased the total number of lenses sold by increasing the availability of the lenses to potential wearers.²⁹³

A free market would have also benefitted the ocular health of current contact lens wearers. By reducing the cost of lenses, consumers would have the financial wherewithal to change their lenses at ECP recommended intervals rather than trying to "stretch" the wearing time of their lenses in order to save money. As Vistakon's own survey and report from the Fall of 1997 indicated:

"Consumers claim that they would comply more if contact lens prices

²⁹⁰Ordover Deposition, at 131.

²⁹¹It is, of course, unnecessary to show impact in a per se case. Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1545-46 (11th Cir. 1996), cert. denied, 1996 U.S. LEXIS 4795. State Plaintiffs contend that this is just such a case.

²⁹²Hall Report at 37-41, Florida Consolidated Facts Tab 47. Greer Report, accord.

²⁹³Id.; Hall Deposition, at 371-72.

were reduced"[with 60% of all consumers agreeing with the statement that] "If contact lenses cost less, I would replace them as often as my eye doctor recommends."²⁹⁴

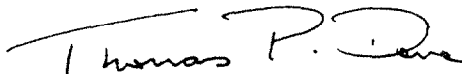
CONCLUSION

The facts demonstrate an effective horizontal group boycott of alternative channels of distribution achieved by a conspiracy organized by the individual defendant ECPs and defendant ECP organizations who then, via the threat of a group boycott, procured the agreement of Vistakon and B&L to implement the ECPs' scheme, to wit, a boycott of alternative channels by the manufacturers.

As shown in Plaintiff States' individual and joint responses to each of defendants' numerous summary judgment motions, the application of the law to these facts shows unequivocally that summary judgment does not lie for any defendant for any cause of action.

Dated: November 13, 1999

For BILL LOCKYER, Attorney General
for the State of California



THOMAS P. DOVE
Deputy Attorney General
State of California
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-3664
(415) 703-5543
Co-Liaison Counsel
Thirty-One Plaintiff States

²⁹⁴Ginis CID at 4-5. See also Johnson & Johnson "Consumer Fact Pack," October, 1997, page 97, Ford Deposition Exhibit 13.